88-1651

Supreme Court, U.S.
FILED
APR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO.

OCTOBER TERM 1988

ROBERT REDMAN

Petitioner

v.

CURTIS LEE CLARK

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

DON W. ATKINS
Principal Attorney, Appeals

153 pp

STATEMENT OF THE QUESTION PRESENTED

WHERE THE STATE TRIAL COURT HAS HELD AN EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE IN A NOW 13-YEAR-OLD MURDER CASE, MAKING CREDIBILITY DETERMINATIONS ADVERSE TO THE CLAIM, AND THE FEDERAL DISTRICT COURT HAS LIKEWISE HELD AN EVIDENTIARY HEARING ON THE ISSUE, MAKING CREDIBILITY DETERMINATIONS ADVERSE TO THE CLAIM,

A) DOES THE PRESUMPTION OF CORRECTNESS WITH REGARD TO STATE COURT FINDINGS REGARDING HISTORICAL FACTS PRECLUDE A DIFFERENT CREDIBILITY DETERMINATION BY THE COURT OF APPEALS, WITHOUT REGARD TO THE HEARING IN THE DISTRICT COURT; AND,

B) IF NOT, DO THE CREDIBILITY DETERMINATIONS MADE BY THE DISTRICT COURT ALSO BAR A DIFFERENT CREDIBILITY DETERMINATION BY THE COURT OF APPEALS?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED.....1

INDEX OF AUTHORITIES.....3

OPINIONS AND ORDER BELOW.....5

STATEMENT OF JURISDICTION.....6

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....6

STATEMENT OF THE CASE.....7

REASONS FOR GRANTING THE WRIT.....27

CONCLUSION.....39

APPENDICES

Magistrate's Report and Recommendation.....1a

Memorandum Opinion.....54a

Opinion of the Sixth Circuit Court of Appeals.....71a

Sixth Circuit Court of Appeals Order Denying Petition for Rehearing En Banc.....109a

INDEX OF AUTHORITIES

CASE PAGE

Anderson v. Bessemer City,
470 U.S. 564, 575, 84 L.Ed.2d 518,
105 S.Ct. 1054, 1512 (1985).....31-32

Baumgartner v. United States
322 U.S. 665, 671, 88 L.Ed. 1525,
1529, 64 S.Ct. 1240, 1244 (1944)....29

Maggio v. Fulford,
462 U.S. 111, 76 L.Ed.2d 794,
103 S.Ct. 2261 (1983).....37-38

Marshall v. Lonberger,
459 U.S. 422, 432,
74 L.Ed.2d 646, 657,
103 S.Ct. 843, 850 (1983).....31,34-35

Miller v. Fenton,
474 U.S. 104, 88 L.Ed.2d 405,
106 S.Ct. 445 (1985).....28-30

Rushen v. Spain,
464 U.S. 114, 120, 78 L.Ed.2d 267,
274, 104 S.Ct. 453, 465 (1983).....31

Strickland v. Washington,
466 U.S. 668 (1984).....13,23,27-28,33

Sumner v. Mata II,
455 U.S. 591, 598, 71 L.Ed.2d 480,
486-487, 102 S.Ct. 1303,
1307 (1982).....31

INDEX OF AUTHORITIES

CONSTITUTION AND STATUTE	PAGE
Fourteenth Amendment	7
Sixth Amendment	6
28 U S C 1254	6
28 U S C 2254(d)	7,27-28
MCL 768.20, 768.21	17

IN THE SUPREME COURT OF THE UNITED STATES

NO.

OCTOBER TERM 1988

ROBERT REDMAN

Petitioner

v.

CURTIS LEE CLARK

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SIXTH CIRCUIT COURT OF APPEALS

NOW COMES Robert Redman, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Don W. Atkins, Principal Attorney,

Appeals and prays that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals entered in the above cause on December 28, 1988, reversing the decision of the District court and remanding this matter to the Distict Court with direc- tions to issue the writ of habeas corpus (CJ Engel, dissenting) and the February 10, 1989 order of the Sixth Circuit Court of Appeals denying a petition for rehearing en banc.

OPINIONS AND ORDER BELOW

The District Court Magistrate's report and recommendation is appended as Appendix A. The opinion of the District Court is appended as Appendix B. The opinion of the Sixth Circuit Court of Appeals is appended as Appendix C. The order denying a petition for rehearing en

banc by the Sixth Circuit Court of Appeals is appended as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the District Court was entered on October 17, 1986. The judgment of the Sixth Circuit Court of Appeals was entered on December 28, 1988. The order denying a petition for rehearing en banc was entered on February 10, 1989. The jurisdiction of this Court is invoked under 28 USC 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part, that in all criminal prosecutions the accused shall have the right to "the assistance of counsel in his defense."

The Fourteenth Amendment provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

28 USC 2254(d) provides, in pertinent part, that the findings of a state court made after a hearing on the merits of a factual issue "... shall be presumed to be correct ...".

STATEMENT OF THE CASE

The pertinent facts are well-stated in the dissenting opinion of Chief Judge Engel of the Sixth Circuit Court of Appeals:

"More than fifteen years ago, on November 17, 1973, the body of Lillie Mae Friday was found in a vacant apartment in Detroit. She had been tied up and her

neck was slashed. While a missing person's report had been filed by one Judy Malone, the crime remained unsolved until October 1974 after petitioner Clark had been arrested for a different crime. At that time, Ms. Malone gave a statement to the Detroit police which implicated the petitioner in Friday's murder. Malone claimed that she had been instructed to make out a missing person's report by Clark, who telephoned Malone, stating that he had killed Friday and left her body in the nearby apartment of Jesse Howard.

"While Ms. Malone was the only witness who testified specifically to Clark's involvement in the crime, her testimony was explicit. She testified that she first met Lillie Mae Friday on October 13, 1973 and that Friday lived with George Douglas, a boyfriend, in an

apartment across the hall. Malone testified to an altercation between petitioner Clark and Lillie Friday, apparently attributable to Clark's belief that Friday had notified the police that Clark was an acquaintance of Douglas, who had earlier been arrested for murder: this provided the motive for Clark's murder of Lillie Mae Friday. Malone further testified that during the altercation, Clark went to get a gun but could not find one, returning later in the evening with a man called 'Little Jack,' later identified as Augustus Jackson-El. According to Malone, Clark left the apartment, leaving Jackson-El with Friday and Malone; Clark did not return until after midnight. Upon returning, Clark stayed for a few minutes then left with Friday. Later, according to Malone, Clark telephoned Malone saying that he had killed Friday and left her body at Jesse Howard's

apartment. He directed Malone to make out a missing person's report for Friday; Malone followed these instruction, making the report on November 16 to Detroit Police Officer James Quarles. At that time, she did not claim any further knowledge of the offense, but in October 1974, after Clark had been arrested for a different crime, she gave a further statement which implicated petitioner in the murder. Clark was arrested for Lillie Mae Friday's murder on January 3, 1975 and was convicted on October 24, 1975 of first-degree murder following a trial in the Detroit Recorder's Court. He had counsel both at trial and on appeal. On April 22, 1977 the Michigan Court of Appeals affirmed. Petitioner then sought leave to appeal to the Michigan Supreme Court but leave was denied November 30, 1977, over three dissents (402 Mich. 817 (1977)). A pro

se petition for writ of habeas corpus was then filed in federal court, denied by then District Judge Cornelia Kennedy on July 25, 1978, and affirmed on appeal by the Sixth Circuit in an unpublished order filed November 20, 1979. See 611 F.2d 371 (1979) (table).

"Petitioner then returned to state court and raised an ineffective assistance of counsel claim for the first time. An evidentiary hearing on this claim was held on February 25, 1982 before Detroit Recorder's Court Judge Justin Ravitz, who had not presided at the original trial. After taking testimony, Judge Ravitz denied a delayed motion for a new trial. Subsequent attempts by petitioner to appeal to the Michigan Court of Appeals and the Michigan Supreme Court were unsuccessful. Thereafter, on November 30, 1983, peti-

tioner Clark filed a second application for writ of habeas corpus in the United States District Court for the Eastern District of Michigan. Upon referral to the United States Magistrate Thomas A. Carlson, an evidentiary hearing was held to determine whether (1) Clark had, under Rule 9 of the rules governing section 2254 cases, abused the writ of habeas corpus and (2) if not, the merits of his ineffective assistance of counsel claim. Magistrate Carlson held a hearing on August 26, 1985 and also considered the separate deposition of Augustus Jackson-El, which was taken on October 2, 1985. In a twenty-nine page opinion, the magistrate recommended denial of the respondent's motion to dismiss under habeas Rule 9, but he also recommended denial of the writ of habeas corpus, concluding, 'I do not believe that petitioner has shown that he was prejudiced

under the Strickland test due either to trial counsel's failure to present witnesses for the defense or appellate counsel's failure to raise the ineffective assistance of counsel claim in the appeal as of right.'

"It is apparent from Magistrate Carlson's opinion that his conclusions were largely based upon an assessment of the credibility of the witnesses who were called upon to testify, including witnesses who petitioner now claims should have been interviewed and called by his original trial counsel, whose failure in this regard, he claims, amounted to ineffective assistance of counsel within the meaning of Strickland v. Washington, 466 U.S. 668 (1984). Magistrate Carlson also had before him the record of proceedings and conclusions of Judge Ravitz concerning the charge that petitioner's trial

counsel was ineffective by failing to interview and call Augustus Jackson-El. Magistrate Carlson particularly agreed with Judge Ravitz's conclusion that petitioner had not been prejudiced by this latter omission:

> The bottom line in terms of my analysis of Augustus Jackson's testimony is drawing, if you will, on the argument made by [the assistant prosecuting attorney], is that I'm not at all sure that Little Jack would have been a favorable witness to the Defense or that skillful and trained and competent criminal attorneys making an informed decision would have concluded that that issue ought to have been raised or that he ought to have been called.
>
> * * *
>
> Suffice it to say at this point, knowing what we know now, I don't think that any skilled trial lawyer would ever want to be in a position where he had to call as a witness Augustus Jackson, certainly not in a jury trial, and without belaboring the point, he certainly struck me as the sort of witness who offers very little in the way of credibility.

"Carlson also concluded that Jackson-El 'would not have made a credible witness and therefore the failure to call him did not prejudice petitioner.'

"On the question of whether petitioner's trial counsel provided ineffective assistance by failing to call alibi witnesses, both Judge Ravitz and Carlson agree that had the matter been called to the attention of trial counsel, it would have been prejudicial for counsel not to have investigated and interviewed those witnesses. If anything is uncertain in the record of this case, it is whether in fact petitioner did apprise trial counsel of the existence of alibi witnesses and of his desire to call them in his own behalf. While petitioner's own recollection seems to have gained considerable clarity during the passage of time, the testimony of the attorneys involved,

including prior attorneys, trial counsel and subsequent appellate counsel, was not nearly so clear. Apparently the trial attorney's original notes had been destroyed when he was replaced by his former partner as appellate counsel. Trial counsel did testify, however, that if he had been told about the alibi he would have looked into it, a construction which Magistrate Carlson appears to have accepted as credible. Carlson also observed, however, that by petitioner's own admission, assuming such an admission was credible at all, Clark did not tell his counsel about these witnesses until a few days before trial. Carlson found that if petitioner had actually told Carlson, even though shortly before trial, the latter would still have been under a duty to request a continuance to give the required ten day notice of alibi required by Michigan law. See Mich.

Comp. Laws (Sec.) 768.20, 768.21. Magistrate Carlson commented that of all Clark's purported alibi witnesses, only Yvonne Hawkins Fair had testified at the hearing before Judge Ravitz; her testimony was that her son had a birthday party on November 13, 1973 and that she and the petitioner went to Cleveland on the following day November 14, the day of the murder, and therefore could not have been in Detroit at the time of the murder. Judge Ravitz made the following assessment of Fair's credibility:

> The trouble with the alibi testimony, in my judgment, and it's a very serious problem, is that I've have (sic) the benefit of hearing from one of the many claimed alibi witnesses, and Miss Hawkins certainly projected well, a lot better than other Defense witnesses. But her memory of the date and her ability to recall it is glaringly deficient to say the very least, and I'm not going to pick apart the testimony, but I think that the record is real clear

> that the quality of the claimed alibi proofs is wanting.

"After hearing many more witnesses, Magistrate Carlson fully concurred with this evaluation:

> The alibi testimony presented to me was simply not believable. Petitioner himself never raised the matter with the trial judge (although he had raised other matters on his own) and both Ms. Fair and her sister, Ms. Burrell, were aware Petitioner was on trial (even attending some of the sessions) and never mentioned the alibi to counsel ... Fair could remember staying at her parent's home but not the particular motel in Akron ... (Motels, of course, keep records which private homes do not). The testimony before me by all of the alibi witnesses, now 12 years after the fact, was so remarkably consistent in all (even minor) details that it appeared clearly prepared and rehearsed. Furthermore, if the witnesses were mistaken by even one day, the alibi would have been broken.

"With respect to the witnesses, Carlson ultimately concluded that 'even if

[attorney] Stern had interviewed the Ohio alibi witnesses, it would have been competent legal advice not to call them, and even if they had been called, their testimony would not have been sufficiently believable that their absence could be said to have deprived Petitioner of a fair trial.' While conceding that petitioner was entitled to the effective assistance of counsel he concluded:

> I do not believe that relief is warranted, however, because, as found above, Petitioner's ineffective assistance of counsel claim is without merit, he was not prejudiced and therefore this claim should also be denied.

"Senior United States District Judge Ralph M. Freeman, with whom objections to the Magistrate's Report and Recommendations had been filed, again carefully reviewed the case and in a nine-page opinion denied the petition for a writ of

habeas corpus. In doing so, Judge Freeman quickly disposed of petitioner's claim that his counsel had been deficient in failing to call petitioner to the stand, noting petitioner's prior criminal record and the weaknesses of the prosecution case at the time, weaknesses which could have led a reasonable counsel to conclude that it was safer to put the government to its proof than to risk the obvious dangers of exposing petitioner's own record. Anyone reading the testimony of the petitioner, particularly the testimony given before Judge Ravitz, would be led to believe that he would be far from an ideal witness in his own behalf. The same, Judge Freeman held, would have been true of Jackson-El who was also incarcerated and who, as noted by Magistrate Carlson, was also imprisoned at the time and was directly implicated in the murder through the testimony of Ms.

Malone. He therefore found that 'petitioner has not shown that trial counsel's conduct in not calling petitioner or Jackson-El to the stand was beyond the wide range of professionally competent assistance.'

"Turning finally to the failure to call alibi witnesses, Judge Freeman viewed this as a 'potentially more serious allegation of ineffective assistance of counsel.' Distinguishing other cited cases of ineffective assistance, Judge Freeman concluded:

> There was no evidence tending to show that the trial attorney was aware of the fact that a previous attorney had withdrawn because of an inability to interview witnesses in Ohio. There is only conflicting evidence as to whether Petitioner actually told his trial attorney of the existence of alibi witnesses. Petitioner claims he told his attorney one time a few days before trial that there were people in Cleveland for the

attorney to interview ... A review of the transcript makes it apparent that the timing of this revelation, if it indeed occurred, put the attorney in an awkward position because 1) it was made only a few days before trial and an attorney must file a notice of defense of alibi at least 10 days before trial (Mich. Comp. Laws, (sec.) 768.20, 768.21) and 2) it was made during an altercation between the attorney and the client Petitioner concerning the attorney's need for a copy of the preliminary hearing transcript. Petitioner did not raise the issue of an alibi defense himself at trial although he was a vocal and assertive defendant. Also, the alleged alibi witnesses did not come forward and identify themselves although two of them attended the trial on at least one occasion. The trial attorney, on the other hand, testified that he does not remember whether he was told about alibi witnesses or not, but that if he had been told, his normal practice would have been to look into the matter ... Inasmuch as the testimony presented at the evidentiary hearing on 8-26-85 indicates conflicts about what occurred some 12 years earlier and raises questions about whether anything pertaining to an alibi was communicated to the attorney, the Court finds that Petitioner has failed to show that the conduct of his attorney

> was unreasonable. The Petitioner has not shown that his trial counsel's performance was deficient pursuant to the first prong of the Strickland test. Therefore, it is not necessary to discuss the second prong of whether counsel's performance prejudiced the defense by depriving Petitioner of a trial whose result is reliable.'"

The Sixth Circuit Court of Appeals reversed on the ground that the Petitioner was denied effective assistance of counsel under the test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). The court held that the district court clearly erred in finding that the Petitioner had failed to carry his burden of showing that his trial counsel's performance had been deficient under the first prong of the Strickland test. Stating the issue in terms of whether trial counsel "... knew about the (alibi) witnesses ...", the court held that the Petitioner had produced sufficient evid-

ence that counsel knew of the witnesses and failed to investigate the matter "(b)ecause petitioner's testimony that he told his trial counsel about the witnesses is uncontradicted, because he unquestionably mentioned them to both Price and Solomon, and because no conceivable reason exists for him to have withheld this information from his counsel." [Appendix C (slip op at 7)].

As to the prejudice prong of the Strickland test, the court held that the failure to present the testimony of the alibi witnesses and that of Jackson-El sufficiently prejudiced the Petitioner's defense so as to "undermine confidence in the outcome." The court reached this conclusion by finding that had an alibi defense been presented "... there would have been several witnesses to contradict the one prosecution witness." [Appendix C

(slip op at 7)]. And, if Jackson-El ("Little Jack") had testified, he could have "directly impeached" the one prosecution witness. [Appendix C (slip op at 7-8)].

Chief Judge Engel issued an eight-page dissenting opinion in which he noted that any failure of counsel, even if constitutionally deficient, would not have rendered the result of the trial "unreliable" within the meaning of Strickland. Judge Engel found that the "totally unconvincing" aspect of the Petitioner's claims was the inconsistency of his own conduct [Appendix C (dissenting op at 7)]:

> "By his own admission, he waited until the eve of trial before mentioning the existence of other witnesses. Even then, he did not mention that these witnesses would validate his alibi. The incredibility of his alibi defense is further punctuated by

> the fact that at least two of those witnesses, whom he years later called to testify, in fact attended his original trial on the murder charge. They could not have failed to recognize the importance of their testimony in exonerating him if his claim was true. Further, it staggers the imagination to believe that Clark, who was not unfamiliar with crime and plainly not bashful about speaking up, would have supinely sat by without clearly asserting his alibi, if in fact he had one."

In finding no more merit in the Petitioner's claims than had the judges who had preceded him, Judge Engel posed the question: "Is it any wonder that neither Magistrate Carlson nor Judge Ravitz, who actually heard the testimony of some of these witnesses, was able to credit this testimony?" [Appendix C (dissenting op at 8)].

A petition for rehearing en banc was denied by the Court of Appeals on February 10, 1989 (Appendix D).

REASONS FOR GRANTING THE WRIT

In Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), it was noted that a state court's ultimate conclusion that counsel rendered effective assistance is not a basic, primary, or historical fact which is binding on the federal court which would be entitled to the presumption of correctness [28 USC 2254(d)]. Rather, it is a "mixed question of law and fact". This is still not to say, however, that the state court's underlying determinations of the facts which support it's conclusions are to be ignored or re-evaluated. "(S)tate court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of Sec. 2254(d), and although district court findings are subject to the clearly erroneous standard

of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." 466 U.S. at 698, 80 L.Ed.2d at 700, 104 S.Ct. at 2070.

In Miller v. Fenton, 474 U.S. 104, 88 L.Ed.2d 405, 106 S.Ct. 445 (1985), this Court readily acknowledged the difficulty in devising the appropriate methodology for distinguishing questions of fact from questions of law in the Sec. 2254(d) context. Therein, this Court noted that it "... has yet to arrive at 'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.' Pullman Standard v Swint, 456 US 273, 288, 72 L Ed 2d 66, 102 S Ct 1781 (1982)." This elusiveness has plagued the Court at least since its decision in Baumgartner

v. United States, 322 U.S. 665, 671, 88 L.Ed. 1525, 1529, 64 S.Ct. 1240, 1244 (1944):

> "The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving **not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print**. The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based." (emphasis added)

In Miller v. Fenton, supra, this Court reasoned that the labeling of an issue as one of "law", "fact", or a "mixed question of law and fact" may be as much a "matter of allocation as it is of analysis" (474 U.S. at 113-114, 88 L.Ed.2d at 413-414, 106 S.Ct. at 452):

"At least in those instances in

> which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.
>
> * * *
>
> "(O)ther considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of 'law' or 'fact' in favor of extending deference to the trial court. **When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight.**" (emphasis added)

A determination as to the credibility of a witness is classically a question of fact. A state court's findings on such an issue is entitled to a "high measure of deference" on habeas

corpus review. They may only be set aside if they lack even "fair support in the record." Rushen v. Spain, 464 U.S. 114, 120, 78 L.Ed.2d 267, 274, 104 S.Ct. 453, 456 (1983); Marshall v. Lonberger, 459 U.S. 422, 432, 74 L.Ed.2d 646, 657, 103 S.Ct. 843, 850 (1983); Sumner v Mata II, 455 U.S. 591, 598, 71 L.Ed.2d 480, 486-487, 102 S.Ct. 1303, 1307 (1982).

Similarly, the findings of a federal district court are to be accorded a high degree of deference in determining whether "clear error" was committed in reaching its ultimate conclusion. In Anderson v. Bessemer City, 470 U.S. 564, 575, 84 L.Ed.2d 518, 529-530, 105 S.Ct. 1504, 1512 (1985), this Court observed:

> "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial

> judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.
>
> * * *
>
> (W)hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

In the instant case, there can be no doubt that the operative findings were of "fact" and not of "law". Six of the seven objections which the Respondent filed to the Magistrate's findings and recommendations related to the credibility findings regarding the alibi witnesses and Augustus Jackson-El [Appendix B; Appendix C (dissenting opinion)]. The seventh objection broadly related to the Magistrate's recommendation that the Respondent had not carried his burden of

showing ineffective assistance of trial counsel. After a thorough review of the record, the district court adopted the Magistrate's recommendations on the credibility issue and then properly applied the Strickland test to those findings of fact in determining that trial counsel's representation was not constitutionally infirm.

The Court of Appeals in the instant matter set forth three reasons to support its decision to reverse the district court (Appendix C):

> "Because petitioner's testimony that he told his trial counsel about the witnesses is uncontradicted, because he unquestionably mentioned them to both Price and Solomon, and because no conceivable reason exists for him to have withheld this information from his counsel, we hold that petitioner has produced sufficient evidence that his trial counsel knew about the witnesses and failed to investigate them. We hold that the

> district court clearly erred in concluding otherwise."

All three bases of the court's decision are themselves founded upon a redetermination of credibility issues - questions of fact - which were proper determinations for the state trial court and the district court to make. The conclusions which the district court drew from these factual determinations were clearly supportable and were not internally inconsistent.

To say that the Respondent's testimony was "uncontradicted" runs afoul of this Court's admonition in Marshall v. Lonberger, 459 U.S. at 434, 74 L.Ed.2d at 658, 103 S.Ct. at 851:

> "The Court of Appeals' reliance on respondent's testimony ... and the fact that 'the state produced no contrary evidence,' is quite wide of the mark for purposes of deciding whether

> factual findings are fairly supported by the record. Title 28 USC Sec. 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."

To say that the Respondent "... unquestionably mentioned them (the witnesses) to both Price and Solomon ..."[1] is itself conjecture and a reinterpretation and reassessment of the testimony taken by the state trial court and the district court. The Court of Appeals itself acknowledged that there was no evidence on the record to indicate that trial counsel (Stern) knew the reason for

---

[1] The Court of Appeals was in error in designating "Solomon" as the Respondent's trial counsel. "Solomon" was the Respondent's first appellate counsel. "Stern" was the Respondent's trial counsel.

former counsel's (Price's) withdrawal or that the Respondent ever referred to these witnesses as "alibi" witnesses on the record during the course of his trial (Appendix C).

To say that "... no conceivable reason exists for him to have withheld this information from his counsel ..." is the most blatant example of appellate reassessment of witness credibility. From the testimony presented, both the state court and the district court (which heard and observed the various witnesses) determined that the Respondent's witnesses were simply not believable. The defendant, though very assertive and vocal at trial, never raised the issue of alibi until his second series of appeals. These are but two of a myriad of plausible reasons which supported the lower courts' conclusions that the Respon-

dent's claims were without merit.

In reversing the decision of the court of appeals in Maggio v Fulford, 462 U.S. 111, 76 L.Ed.2d 794, 103 S.Ct. 2261 (1983) which had held that a state court judge's findings were not fairly supported by the record because he had rejected unimpeached psychiatric testimony concerning a prisoner's competency, this Court made the following observations which are equally applicable to the instant case:

> "We believe that, in reaching this conclusion, the Court of Appeals erroneously substituted its own judgment as to the credibility of witnesses for that of the Louisiana courts - a prerogative which 28 USC Sec. 2254 [28 USCS Sec 2254] does not allow it. Marshall v Lonberger, 459 US 422, 74 L Ed 2d 646, 103 S Ct 843 (1983).
> (462 U.S. at 113, 76 L.Ed.2d at 797, 103 S.Ct. at 2262)

* * *

"Thus, the three judges of the Court of Appeals appear to have differed from the Louisiana trial judge, the seven Justices of the Supreme Court of Louisiana, and the Federal District Judge, only with respect to evaluation of the evidence before the trial court. (462 U.S. at 116, 76 L.Ed.2d at 799, 103 S.Ct. at 2263)

* * *

"The Court of Appeals apparently concluded that the trial judge was obligated to credit both the factual statements and the ultimate conclusions of Dr. McCray solely because he was 'unimpeached.' 692 F2d, at 361. This is simply not the law.

'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. ... How can we say the judge is wrong? We never saw the witnesses.' United States v Oregon Medical Society, 343 US 326, 339, 96 L Ed 978, 72 S Ct 690 (1952), quoted in Marshall v Lonberger, 459 US, at 434, 74 L Ed 2d 646, 103 S Ct 843."
(462 US at 117-118, 76 L.Ed.2d at 800, 103 S.Ct. at 2264) (emphasis added)

Petitioner submits that this Court should grant plenary review and resolve this important question.

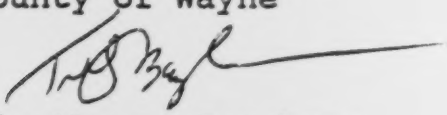
CONCLUSION

The majority of the Court of Appeals panel, over a vigorous dissent by the Chief Judge of that court, has ordered a new trial in a thirteen-year-old state murder case. It has done so by finding ineffective assistance of counsel despite credibility determinations of the state trial court judge and the federal district court which mandate an opposite determination. This Court should grant certiorari to delineate more fully the principles regarding questions of "fact" and questions of "law" as they relate to the presumption of correctness and the clearly erroneous standard for federal review.

WHEREFORE, for the reasons above stated, Petitioner submits that plenary review should be granted.

Respectfully submitted,

John D. O'Hair
Prosecuting Attorney
County of Wayne



Timothy A. Baughman
Chief of Research,
Training and Appeals
1441 St. Antoine
Detroit, MI 48226
(313) 224-5792

Don W. Atkins
Principal Attorney, Appeals

Dated: March 23, 1989
TAB/mlw

APPENDICES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CURTIS CLARK,

Petitioner,

v. CIVIL ACTION NO. 83-CV-5515-DT

ROBERT REDMAN, HONORABLE RALPH M. FREEMAN

Respondent. MAGISTRATE THOMAS A. CARLSON

April 25, 1986

MAGISTRATE'S REPORT AND RECOMMENDATION

RECOMMENDATION:

The instant petition for writ of habeas corpus should be denied as Petitioner has not shown that he was sufficiently prejudiced by his trial counsel's failure to call the alibi witnesses that Petitioner now claims he should have called. Respondent's Rule 9 Motion to Dismiss, however, should also be denied, as Petitioner has not filed a "delayed petition" nor has he "abused the writ."

* * *

I. History of the Case

This case was referred to the undersigned for an evidentiary hearing by Judge Ralph M. Freeman on March 29, 1985, "on both the threshold question of the applicability of Rule 9 and merits of the ineffective assistance of counsel claim." Primarily, Petitioner claims that his trial attorney should have produced alibi witnesses. The evidentiary hearing was held on August 26, 1985. A separate deposition of a witness was held on October 2, 1985.

On October 24, 1975, Petitioner was convicted by a jury of first-degree murder. Mich. Comp. Laws 750.316. He was sentenced by Detroit Recorder's Court Judge John L. Kadela to life imprison-

ment. He then appealed. The attorney appointed for him on appeal was Barry Solomon, the law partner of his trial attorney, Robert Stern. On April 22, 1977, the Michigan Court of Appeals affirmed. (Docket No. 26922). Petitioner then appealed to the Michigan Supreme Court without an attorney's help. On November 30, 1977, with three dissents, the Michigan Supreme Court denied leave to appeal. 402 Mich. 817 (1977).

Petitioner then, once again without the aid of an attorney, filed a petition for writ of habeas corpus in federal court. On July 25, 1978, Judge Cornelia Kennedy of this Court denied the petition. Civil Action No. 78-70688. The Sixth Circuit affirmed on November 20, 1979. 611 F.2d 371 (1979).

Not until a second appeal in the state courts did Petitioner raise his ineffective assistance of counsel claim. An evidentiary hearing was held on this issue in the courtroom of Detroit Recorder's Court Judge Justin Ravitz on February 25, 1982. Judge Ravitz subsequently denied the delayed motion for a new trial. On October 28, 1982, the Michigan Court of Appeals denied leave to appeal (Docket No. 65499) and on July 22, 1983, the Michigan Supreme Court denied leave to appeal. 417 Mich. 1065 (1983).

II. Facts of the Case

On November 17, 1973, Lillie Mae Friday was found tied up in a vacant apartment in Detroit with her neck slashed. (Trial transcript [TT], pp. 96, 100, 119-121). The prosecution presented

fifteen witnesses in the four day trial. Only one of them, Judy Malone, implicated Petitioner. Ms. Malone testified that she first met Friday on October 13, 1973. (TT, p. 137). Friday lived across the hall from Malone and was living with her boyfriend, George Douglas, and her child. On November 15, 1973, Petitioner was in Malone's apartment with Malone and Friday. At that time, he was angry with Friday stating that he would kill her. Apparently Douglas had been arrested for murder and Petitioner had accused Friday of having given the police Petitioner's name as Douglas' acquaintance. (TT, p. 141).

Petitioner eventually left stating that he would get a gun. (TT, p. 142). He came back around 11:00 p.m. with a man

named Little Jack. (TT, p. 144).[1] At that time Petitioner stated that he had a razor because he could not get a gun. (TT, p. 145), but a few minutes later he left and did not return until midnight. (TT, p. 146). Jackson-El, however, stayed behind with the two women. (TT, p. 146). After he returned, Petitioner once again stayed only a few minutes. This time he left with Friday. (TT, p. 147). Later, he telephones Malone stating that he had killed Friday and had left her body at Jesse Howard's apartment (TT, p. 150).[2] He told Malone to make out a missing person's report for Friday.

---

[1]Little Jack was subsequently identified as Augustus Jackson-El. (October 2, 1985, Deposition Transcript [DT] p. 5). Jackson-El is presently incarcerated in the State Prison of Southern Michigan at Jackson (SPSM). (DT, p. 6). He changed his name from Jackson to Jackson-El between 1978 and 1980. (DT, p. 4).

[2]The apartment in which Friday's body was found had in fact been rented to Howard. (TT, p. 119).

(TT, p. 150). This missing person's report was made out by Malone to Detroit Police Officer James Quarles on November 16. (TT, p. 115). She did not tell the police that Petitioner had committed the murder until October of 1974, however, after Petitioner had been arrested for a different crime. (TT, p. 151). She testified that she did not speak earlier because she had been afraid. (TT, p. 151). Petitioner was arrested for Friday's murder on January 3, 1975. (TT, p. 213).

Petitioner claims that his attorney acted ineffectively by not adequately investigating his defense. He also faults his first appellate attorney for not raising this issue on appeal. He claims that he was in Cleveland, Ohio, at the time that Malone said that he was killing Friday in Detroit. First, he

faults attorney Stern for not having called the witnesses who could have substantiated his claims that he was in Cleveland at the relevant time. Second, he complains that Stern did not call Jackson-El as a witness. Third, he faults Stern's decision not to allow Petitioner himself to testify.

Both at the Evidentiary Hearing held in Recorder's Court and at the Evidentiary Hearing held in my courtroom, Yvonne Hawkins Fair testified that she was with Petitioner in Cleveland for the week starting November 14, 1973. (February 25, 1983 Evidentiary Hearing Transcript [REHT I], p. 52)(Evidentiary Hearing Transcript [EHT], p. 42). She testified that Petitioner was her boyfriend at that time. (EHT, p. 39). She remembers that she was in Cleveland at that time because, on November 13, 1973, her oldest

son turned 13. (EHT, p. 40). A party was held in Detroit (with Petitioner present) on that day. (EHT, pp. 40-41). Afterwards, she left her two children at her sister's house and went with Petitioner to Cleveland to visit her parents. (EHT, pp. 41-42). She said they arrived in Cleveland between 7:30 and 8:00 p.m. on November 14. (EHT, p. 44).

On the 15th, she managed to get Jack W. Hughes, a friend of the family, to give her son fifty dollars. (EHT, pp. 54-55). Her testimony was corroborated by her sister (EHT, pp. 60-61), by Hughes (EHT, pp. 70-74), by her father (EHT, pp. 75-77), and by Petitioner (EHT, pp. 90-94).

Fair and Petitioner broke up in the latter part of 1974. (REHT I, p. 65).

Petitioner's trial was held in October 1975. She attended the first day of trial. (EHT, p. 47). She did not think of the trip to Cleveland at that time and did not talk with Stern. (EHT, p. 48). In fact, she did not think of the Cleveland trip as being relevant until she later read the Trial Transcript with her sister at Petitioner's mother's house. Moreover, she did not see Petitioner in jail before the trial. (EHT, p. 56). Her sister verified this testimony also. (EHT, pp. 65-66).

Jackson-El testified at the Recorder's Court hearing in 1982 that on November 15, 1973, he received a call from Malone (REHT I, p. 113) and went to her apartment. He did not see Petitioner there at anytime that night. (REHT I, p. 117). At the deposition, however, he changed his testimony, stating that the

phone call occurred in October of 1973. (DT, pp. 8-9). He said that the November 15 date was probably given to him by someone else. (DT, p. 18). He still testified, however, that he was not involved in the murder as Malone had accused. (DT, p. 30). Both at the Recorder's Court evidentiary hearing and at the disposition, he testified that two police officers and Douglas tried to get him to perjure himself to convict Petitioner. (REHT I, p. 119) (DT, p. 24).

Soon after his arrest, Petitioner was appointed an attorney name William L. Price. On September 19, 1985, Price swore out an affidavit which states:

> That subsequent to the [preliminary] examination and after a consultation with the Defendant, Curtis Clark, I did petition the court for permission to withdraw as

> attorney in this matter, inasmuch as my trial calendar would not permit me to interview the several witnesses that the Defendant had in the State of Ohio and initiate other investigation necessary to provide the Defendant with an opportunity for a fair trial.[3]

After Price withdrew as Petitioner's attorney, he was appointed Raymond Willis and Lonnie Smith.[4] Petitioner testified that he did not discuss his alibi with either of these attorneys because

---

[3]Oddly enough, this affidavit contradicts Petitioner's testimony at the Detroit Recorder's Court evidentiary hearing. (REHT I, pp. 180-181). It coincides, however, with his most recent testimony. (EHT, p. 105).

[4]The record is unclear which of these two attorneys was appointed first.

the two of them had wanted him to plead. (REHT I, pp. 173-174, 180). Consequently, both these attorneys were allowed to withdraw as well.

Petitioner's last trial attorney was Stern. At first, Petitioner refused to speak with Stern because he did not want him as his trial counsel. (EHT, pp. 85-86). He testified that he told Stern about his alibi witnesses, only a few days before trial, however (EHT, p. 95) and that Stern replied that the prosecution did not have a case and that they did not need any witnesses (EHT, p. 94). Stern also stated, according to Petitioner, that he did not believe that Jackson-El would make a good witness because he was at that time in prison. (EHT, p. 97).

On the first day of trial, Petition-

er filed a number of pro se motions. In one of them, he complained about being locked up and asserted that he could not find his witnesses. (TT, p. 5). The next day, he asked the trial judge to discharge Stern and appoint an attorney named Neal Bush in his place. (TT, p. 15). The trial judge summarily denied his request. At no time did Petitioner specifically tell the trial judge about his alibi witnesses. (EHT, p. 98).

Both at the Recorder's Court evidentiary hearing and at the more recent hearing in this Court, Stern testified that he could remember very little about the matter. In the first evidentiary hearing, he testified that he did not remember the trial at all. (REHT I, p. 39). He testified that he would have investigated if Petitioner had told

him about certain alibi witnesses and that he generally let a defendant himself decide whether to testify or not. (REHT I, p. 42). He testified that he believed that Petitioner did not mention an alibi because if he had, he would have addressed the court. (REHT I, p. 96). Stern and Solomon broke up their partnership in 1976 or 1977 (EHT, p. 12) and neither of them were able to find their files concerning Petitioner's case. (EHT, pp. 12, 26).

At the more recent evidentiary hearing, Stern testified that he did in fact remember the trial. (EHT, p. 29). He did not, however, recall either Malone's testimony or Petitioner mentioning an alibi defense to him (EHT, pp. 25, 29). He testified that if he had been told about the alibi witnesses, he would have interviewed them and called

them if their testimony would have been favorable. (EHT, p. 35).

Solomon, the appellate attorney, testified at the earlier evidentiary hearing that he did not remember Petitioner complaining about his trial representation. (REHT I, p. 14). His partnership with Stern, however, would not have precluded him from raising an ineffective assistance of counsel claim. (REHT I, p. 17). His testimony at the more recent evidentiary hearing, however, was a little different. He testified that he remembered something about Petitioner claiming that Stern did not call his alibi witnesses. (EHT, p. 16). He testified that he must have, however, asked Stern about the matter and must have been satisfied with the answer because he did not raise it as an issue. (EHT, pp. 16-17). He did not remember

having tried to locate the alibi witnesses. (EHT, p. 17).

Solomon also testified that he told Petitioner that he was a partner of Stern. (EHT, p. 8). Petitioner, on the other hand. testified that Solomon specifically denied this matter to him. (EHT, p. 1010). He also testified that Solomon told him that he did not need to raise the ineffective assistance of counsel claim because "it might have been the best strategy in the world not to bring the witnesses." (EHT, p. 103).

III. Rule 9(a)-Delayed Petition

Petitioner waited over eight years after his conviction before he raised his ineffective assistance claims in federal court. Respondent claims that the State has been prejudiced and that the petition

should be dismissed.

There is no general statute of limitations in federal habeas cases. Heflin v. United States, 358 U.S. 415 (1959). Instead, delay in filing is governed by Rule 9(a) of the Rules Governing Section 2254 Cases:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Rule 9(a) rests on the equitable doctrine of laches. Davis v. Adult Parole Authority, 610 F.2d 410, 414 (6th Cir. 1979). The ability to retry the petitioner is irrelevant. The issue is solely whether the State has been pre-

judiced in its ability to respond in the habeas suit itself. Roland v. Mintzes, 554 F.Supp. 881 (E.D.Mich. 1983). Dismissal under this Rule is permissive and not mandatory. It is within the district court judge's discretion. Berry v. Mintzes, 726 F.2d 1142 (6th Cir. 1984), 104 S.Ct. 3520 91984). However, "[g]iven the Rule's potentially devastating impact on the availability of habeas relief to state petitioners, it must be carefully considered and liberally construed." Davis, supra, 610 F.2d at 413.

Respondent points to Solomon's and Stern's general inability to recall the salient facts in this case as the basis for its claim of prejudice. The prejudice in Davis, however, was somewhat similar. In that case, a transcript was missing and the Sixth Circuit found no

violation of Rule 9(a) because the delay in filing the petition did not bear on the absence of the transcript. 610 F.2d at 416.

Likewise, in the present case, Petitioner's failure to raise the ineffective counsel claim earlier does not appear to be the cause of the claimed (memory failure) prejudice. At the very earliest, Petitioner could have raised the claim in 1978 when he filed his first habeas petition in federal court. Even then, however, the issue had not been exhausted because Solomon had not raised the issue in the appeal as of right. Yet, Solomon and Stern dissolved their partnership in 1976 and 1977 (when Petitioner's files were lost) and the undersigned is not persuaded that either counsel would have remembered the case any better even if the first (1982)

evidentiary hearing had been held a few years sooner.

Balancing the prejudice to Respondent with the reasons for the delay and the policies behind the habeas corpus statutes, I recommend that the case not be dismissed pursuant to Rule 9(a).

IV. Rule 9(b)-Abuse of the Writ

Respondent also argues that the case should be dismissed because this is Petitioner's second habeas petition. The doctrine of res judicata does not apply to federal habeas suits. Sanders v. United States, 373 U.S. 1 (1963). Instead, prior petitions are governed by Rule 9(b) of the Rules Governing Section 2254 Cases:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for

> relief and the prior determination was on the merits or, if new and different grounds were alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Once this part of the Rule has been pled, the burden of proving a lack of abuse lies with the petitioner. Price v. Johnston, 334 U.S. 266 (1948).

Because the issues that Petitioner is raising in the present case are different from those raised in his previous petition, the first half (successive petitions) of Rule 9(b) does not apply. Instead, the second half (abuse of the writ) might be applicable. Petitioner will have been found to have abused the writ if he deliberately withheld a claim or inexcusably neglected to present it in his previous petition.

McLaughlin v. Gabriel, 726 F.2d 7, 10 (1st Cir. 1974).

In the present case, the record shows that Petitioner did not raise the ineffective assistance of counsel claims in his first petition because they were not exhausted at that time. Despite Petitioner's request, Solomon did not raise the issue in his appeal as of right to the Michigan Court of Appeals.

Petitioner, however, could have filed his delayed motion for a new trial after the Michigan Supreme Court first denied leave to appeal rather than immediately filing a petition for writ of habeas corpus. Then, after he had exhausted the present claims, he could have filed all of his claims in one petition. Avoiding piecemeal litigation is one of the policies behind Rule 9(b)

and this rationale has been adopted in a number of cases. Miller v. Bordenkischer, 764 F.2d 245, 252 (4th Cir. 1985); Jones v. Estell, 722 F.2d 159, 168 (5th Cir. 1983)(en banc), cert. denied, 104 S.Ct. 2356 (1984); Cody v. Missouri Board of Probation Parole, 468 F.Supp. 431 (W.D.Mo. 1979).

These cases, however, can be distinguished from the present one. First, in these cases, the petitioner had an attorney assist him in filing his first habeas petition. Jones in particular stresses a difference between a pro se petitioner and one who had counsel.

722 F.2d at 165.[5] In fact, in Berry, supra, the Sixth Circuit found no abuse of discretion in denying a motion to dismiss under Rule 9(b) where the Petitioner was not assisted by counsel when he filed his first petition.

Furthermore, Jones specifically noted that ineffective assistance of appellate counsel may excuse the failure to raise an issue before the second petition. 722 F.2d at 167. In the pres-

---

[5]This fact likewise distinguishes Woodard v. Hutchins, 464 U.S. 377 (1984). Woodard is further distinguished because it, unlike the present case involved the death penalty. In Leroy v Marshall 757 F.2d 94, 97 (6th Cir. 1985), cert. denied, 106 S.Ct. 99 (1985), the Sixth Circuit found that because the petitioner was serving a sentence of life imprisonment, the district court had not abused its discretion in refusing to dismiss under Rule 9(b).

ent case, Petitioner is specifically arguing the ineffective assistance of appellate counsel.

Furthermore, in cases like Tannehill v. Fitzharris, 451 F.2d 1322, 1324 (9th Cir. 1971), and United States ex rel. Rivera v. Franzen, 564 F.Supp. 723, 725-726 (N.D.Ill. 1983), courts have specifically rejected Respondent's position as did Judge Charles Joiner of this Court in Roland, supra, 554 F.Supp. at 886:

> Actions of his appointed appellate counsel and delays in the state appellate courts were at least partially responsible for the fact that [the petitioner] did not exhaust state court remedies as to his present claims until August 19, 1981, and thus, could not raise the issues in a habeas proceeding until that time. In the absence of a clear showing that Petitioner abused the writ, dismissal pursuant to rule 9(b) is unwarranted.

It seems unlikely that a petitioner would deliberately withhold a claim "at a monstrous cost of long years in prison . . . by postponing the issues now posed," United States ex rel. Coffey v. Folette, 310 F.Supp. 946, 947 (S.D.N.Y. 1969), aff'd., 423 F.2d 750 (2d Cir. 1970), and the undersigned accordingly recommends that the motion to dismiss pursuant to Rule 9(b) be denied.

V. Ineffective Assistance of Trial Counsel

The standard for an ineffective assistance of trial counsel claim is found in Strickland v. Washington, 466 U.S. 668, 687 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the

> Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced that defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Before looking at the merits of Petitioner's claim, however, it is appropriate to address Respondent's argument that the presumption of correctness applies.

The statutory presumption of correctness is found in 28 U.S.C. (Sec.) 2254 (d):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of the factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other

> reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit [one or more of eight situations].

The main factual issues in the present case are whether Petitioner told his trial attorney about the alibi witnesses he wanted called, and, if so, why trial counsel did not call them to the witness stand. The trial court's findings of fact after the evidentiary hearing, however, do not specifically address these factual issues. In fact, it is very difficult to determine whether the trial judge rejected Petitioner's allegations that he told Stern about his witnesses or whether he accepted these allegations but denied the claim as a matter of law. Questions of the ineffective assistance of counsel are generally mixed questions of law and fact which are not entitled to the presumption of correctness. Strick-

land, supra, 466 U.S. at 698.

The trial judge did state, "I can say without any reluctance that I was not impressed with the testimony of either attorney." (February 26, 1982 Evidentiary Hearing [REHT II], p. 54). Overall, though, his conclusion is summed up as follows:

> I don't come away with a lasting impression or any firm belief that Mr. Stern did adequately represent Mr. Clark. What I am saying, however, is that the Defense had not established to my satisfaction that he did not do so, that he did not render effective assistance of counsel in the two areas that I referred to and that are before me, or that he failed to comply with those Sixth Amendment standards in a way that creates prejudicial error.

(REHT II, p. 60). In light of these conclusions, it is difficult to know to which findings of fact Respondent wants

to apply the presumption of correctness.

In LaVallee v. Delle Rose, 410 U.S. 690 (1973), the Supreme Court was faced with a somewhat similar situation. There, the trial judge stated, after the evidentiary hearing, that based on all of the evidence he found a confession to be voluntary. The district court judge did not apply the presumption of correctness in the subsequent habeas action because he could not tell to what extent the trial judge had credited the various testimony. Consequently, he ruled that the trial court had not made an adequate determination of the facts. Section 2254 (d)(1).

The Supreme Court, however, disagreed with the district court's conclusions. First, it stated that it was reasonably certain that the trial judge

would have granted relief if he had believed the facts as the district court had found. Second, there was no evidence that he applied the wrong standard. Id. at 695.

LaVallee was distinguished in Fowler v. Jago, 683 F.2d 983 (6th Cir. 1983), cert. denied, 460 U.S. 1098 (1982). There, the Sixth Circuit held that the district judge has broad power to hold de novo evidentiary hearings. Id. at 987. It ruled that under both (Sec.) 2254(d) and Townsend v. Sain, 372 U.S. 293 (1963), the District Court has the duty to determine whether or not the facts were adequately resolved:

> [T]his court must examine the findings of the state judge to determine if they are adequate to support the presumption of correctness under (Sec.) 2254 (d). These findings must be sufficient to enable the District Court to fulfill its obligation to determine that

> they are supported by the evidence and that the correct standards of law were applied. The Federal District Court may dismiss the petition without a hearing only if the findings of the state judge are sufficient to enable the Federal District Judge to determine that they are supported by the evidence and that the correct standards of law were applied.

Id. at 988-989.

Citing LaValle and Townsend, the Sixth Circuit ruled that the District Court must in general defer to the state court and assume that it correctly resolved the facts. However, reconstruction of facts will not be possible if it is unclear whether or not the trial court applied the correct constitutional standards. Id. at 989-990. The District Court is to accept the findings only if it can scarcely be doubted (1) that the trial judge resolved all relevant factual

issues and (2) there is no evidence that he used the wrong standards. Id. at 990.

The present situation is like Fowler: "Where findings cannot be inferred and where there has been no articulation of the standards used by the state trier of fact, the District Court must hold its own hearing." Id. at 991-992. In Fowler, the Sixth Circuit did not know the basis for the findings. Id. at 991. Likewise, as stated above, the basis for Judge Ravitz' findings is unclear. Furthermore, it is questionable that he applied the correct (current) legal standard as Strickland was not decided until over two years later. Consequently, I conclude that the statutory presumption of correctness should not apply in this case.

Turning to the merits of the substantive claim, Petitioner faults counsel for not having (1) interviewed and secured his alibi witnesses, (2) interviewed and secured as a witness Augustus Jackson-El, and (3) not calling Petitioner to the witness stand.

The third of these allegations is easily dispensed with. At trial, Stern specifically stated: "Your Honor, after discussing with the defendant at this time we would have no testimony or witnesses to present, and we would close." (TT, p. 219). Petitioner testified that Stern had told him that if he did testify, his criminal record would be used to impeach him. (EHT, p. 102).

As stated in Strickland, supra, 466 U.S. at 689-690:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption, that, under the circumstances, the challenged action "might be considered sound trial strategy."

* * *

The court must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court

> should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

I conclude that Petitioner has not met his burden of showing that he was deprived of the effective assistance of counsel by the decision to keep him off the stand. Particularly in the light of the somewhat slim nature of the prosecution's proofs, the decision not to have Petitioner testify was a matter of legitiimate trial strategy. Considering Petitioner's prior criminal record and the brutal crime involved, the jury might well have shifted its focus from the prosecution's burden to prove its case beyond a reasonable doubt instead to Petitioner's character.

Petitioner's other two claims are more difficult. Ordinarily, a reasonably competent attorney will conduct an in-depth investigation into the case and interview all available witnesses. Hawkman v. Pratt, 661 F.2d 1161, 1168 (8th Cir. 1981). As stated in Strickland, supra, 466 U.S. at 691: "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." An otherwise admirable defense will not excuse the failure to adequately investigate. Keys v. Duckworth, 761 F.2d 390, 392, n.3 (7th Cir. 1985). Accordingly, "[i]t is axiomatic that a defense counsel must interview witnesses to the crime and alibi witnesses." United States ex rel. Harris v. Reed, 608 F.Supp. 1369, 1381 (N.D.Ill. 1985).

The record here does suggest that Stern, for whatever reason, failed to interview either Jackson-El or any of the alibi witnesses, even though Jackson-El was identified as "Little Jack" in the preliminary examination, and even though the reason Price gave for withdrawing from the case was that he did not have enough time and resources to investigate Petitioner's witnesses in Ohio.

During the state court evidentiary hearing, Judge Ravitz told Stern to take the trial transcript and read it outside the courtroom. (REHT I, p. 49). Even after doing so, Stern testified that he did not see Jackson-El's importance in the case. (REHT I, p. 101). Later, Judge Ravitz stated of Stern: "even when the trial transcript was made available to Mr. Stern, his reading of it was, in my judgment, deficient." (REHT II, pp. 53-54).

Petitioner testified before this Court that he had told Stern that "Little Jack" was Jackson-El and that he was at that time incarcerated and willing to testify for him. (EHT, p. 100) (REHT I, p. 152). He testified that Stern responded, however, that Jackson-El would not "be a good witness because he was in prison." (EHT, p. 97). Jackson-El testified that he would have been willing to testify on Petitioner's behalf at trial if he had been asked. (REHT I, p. 122).

In closing arguments before Judge Ravitz, the assistant prosecuting attorney stated that Stern "probably violated [his affirmative] obligation [to investigate] by not looking into Mr. Jackson's testimony." (REHT II, p. 40). Although he did not disagree, Judge Ravitz found, however, that Petitioner had not been prejudiced:

> The bottom line in terms of my analysis of Augustus Jackson's testimony is drawing, if you will, on the argument made by [the assistant prosecuting attorney], is that I'm not at all sure that Little Jack would have been a favorable witness to the Defense or that skillful and trained and competent criminal attorneys making an informed decision would have concluded that that issue ought to have been raised or that he ought to have been called.
>
> * * *
>
> Suffice it to say at this point, knowing what we know now, I don't think that any skilled trial lawyer would ever want to be in a position where he had to call as a witness Augustus Jackson, certainly not in a jury trial, and without belaboring the point, he certainly struck me as the sort of witness who offers very little in the way of credibility.

(REHT II, pp. 56, 57).

The undersigned agrees with these statements. Nothing in the record suggests an excuse for Stern not having gone to SPSM to interview Jackson-El. On the

other hand, that does not necessarily mean that counsel was ineffective in not placing the witness on the stand. Petitioner argues that Jackson-El would have contradicted Malone. True, but what else would one expect? The jury could easily have discounted his testimony because, otherwise, he might inculpate himself in a premeditated murder. Furthermore, as Judge Ravitz pointed out, Jackson-El's character would then have been placed before the jury and this would not have helped Petitioner.

Moreover, even if Stern were ineffective in his trial performance, that does not necessarily mean that Petitioner is entitled to relief. He must establish a reasonable probability that he was harmed by the failure to call the witness, and that the result of the trial would have been different. Weeks v.

Scurr, 608 F.Supp. 884, 895 (W.D.Mo. 1985). As stated in the concurrence by Justice Blackman in Nix v. Whiteside, ___ U.S. ___ 106 S.Ct. 988, 1004 (1986), "The touchstone of a claim of prejudice is an allegation that counsel's behavior did something to 'deprive the defendant of a fair trial, a trial whose result is reliable.'" As stated by the majority in Nix, the defendant need not establish that it is more likely than not that the outcome would have been altered, but must show a reasonable probability that it would have been. Id. at 999.

I do not find such a reasonable probability on this issue. For the reasons stated above, Jackson-El would not have made a credible witness and therefore the failure to call him did not prejudice Petitioner.

The last claim involving Stern is his failure to call alibi witnesses. Stern testified that if he had been told about the alibi, he would have looked into the matter. (EHT, pp. 34-35). However, he did not believe that Petitioner mentioned his alibi to him because, if he had, Petitioner would have mentioned it to the court as well, as he did a number of other matters. (REHT I, p. 96). Still, Petitioner testified that he did tell Stern about his alibi witnesses (EHT, p. 95) and that Stern replied that the prosecution did not have a case and that they did not need any witnesses (EHT, p. 94). He admittedly, however, did not tell his counsel about these witnesses until a few days before trial. (EHT, p. 95).

Even if Petitioner's testimony is true, Stern was placed in a most diffi-

cult situation. For a defendant to present alibi witnesses, he must have filed a notice of a defense of alibi at least ten days before the trial. Mich. Comp. Laws (Sec.) 768.20, 768.21, although that by itself would not relieve an attorney from requesting a continuance to give the required notice.

Of the alibi witnesses, only Fair testified at the original evidentiary hearing. In his opinion, Judge Ravitz seriously doubted that the jury would have believed her.

> The trouble with the alibi testimony, in my judgment, and it's a very serious problem, is that I have the benefit of hearing from one of the many claimed alibi witnesses, and Miss Hawkins certainly projected well, a lot better than other Defense witnesses. But her memory of the date and her ability to recall it is glaringly deficient to say the very least, and I'm not going to pick apart the testimony, but I think that the record is real

> clear that the quality of the claimed alibi proofs is wanting.

(REHT II, p. 60). Although she testified that her son had had his birthday party on November 13, 1973, and that both she and Petitioner had gone to Cleveland to her parents the next day, Ms. Fair did not mention anything about the $50 gift from Hughes which was talked about so much at the evidentiary hearing in this Court.

Both in the Michigan appellate courts and before this Court, Petitioner has challenged Judge Ravitz's conclusion that relief should be denied because Fair would not have made a credible witness. Citing such cases as Brown v. Blackburn, 625 F.2d 35 (5th Cir. 1980), and Rummel v. Estelle, 498 F.Supp. 793 (W.D.Tx. 1980), he argues that the strength of the alibi defense is not a proper consider-

ation when the reviewing court decides this issue. Both of these cases, however, seem to rely on a per se reversal standard for the ineffective assistance of counsel. To the extent that Brown and Rummel support Petitioner's position, they were overruled in Strickland which rejected a per se reversal standard.

In the present case, it appears likely (in light of the affidavit of the first appointed attorney, Mr. Price) that Petitioner was at least contemplating an alibi defense. However, it also appears equally likely that he either 1) chose not to tell Stern or 2) he told Stern who felt it unnecessary of inadvisable to contact the witnesses. Facts suggesting a complete failure to mention include Stern's inability to recall being advised. Petitioner's failure to raise the matter along with his other, pro se,

motions, and the attendance of two of the witnesses at trial without even mentioning the alibi to counsel. On the other hand, Petitioner did say he told Stern of the witnesses, the lawyer had no independent recollection one way or the other, and it would not be implausible that counsel might have wished instead to concentrate on and emphasize the weaknesses in the state's case rather than shift the focus to the credibility of his client's friends and acquaintances.

In any event, even assuming that Petitioner did tell Stern of his alibi witnesses; and recognizing that one should only carefully find harmless a failure to present an alibi, the undersigned still concludes that Petitioner would not have been prejudiced under Strickland for such a failure under the present circumstances. The alibi testi-

mony presented to me is simply not believable. Petitioner himself never raised the matter with the trial judge (although he had raised some matters on his own), and both Ms. Fair and her sister, Ms. Burrell, were aware Petitioner was on trial (even attending some of the sessions) and never mentioned the alibi to counsel. (EHT, pp. 47, 64-65). Fair could remember staying at her parents' home but not the particular motel in Akron (REHT I, p. 57). (Motels, of course, keep records which private homes do not). The testimony before me by all of the alibi witnesses, now 12 years after the fact, was so remarkably consistent in all (even minor) details that it appeared clearly prepared and rehearsed. Furthermore, if the witnesses were mistaken by even one day, the alibi would have been broken.

The undersigned finds that even if Stern had interviewed the Ohio alibi witnesses, it would have been competent legal advice not to call them, and even if they had been called their testimony would not have been sufficiently believable that their absence could be said to have deprived Petitioner of a fair trial.

VI. Ineffective Assistance of Appellate Counsel

Petitioner also claims that he was deprived of the effective assistance of appellate counsel because Solomon did not raise his ineffective assistance of counsel claim in the appeal as of right. Solomon testified that he would have argued the ineffective assistance of counsel (of his own partner) if he believed that such an issue was warranted. (EHT, pp. 21-22). The more appropriate thing to do,

however, would have been to withdraw from the case if such a situation arose.

A criminal defendant has the right to the effective assistance to counsel in a state appeal as of right. Evitts v. Lucey, 105 S.Ct. 830 (1985). Appellate counsel must raise an argument if it has a reasonable potential for success. O'Guin v. Foltz, 715 F.2d 397 (6th Cir. 1983); Thor v. United States, 574 F.2d 215, 221 (5th Cir. 1978); In re Spears, 157 Cal. App. 3rd 1203, 204 Cal. Rptr. 333 (1984).

I do not believe that relief is warranted, however, because, as found above, Petitioner's ineffective assistance of counsel claim is without merit, he was not prejudiced and therefore this claim should also be denied. Bowen v Foltz, 763 F.2d 191, 194 (6th Cir. 1985),

cert. denied, 106 S.Ct. 601 (1985); United States ex rel. Bradley v. Hartigan, 612 F. Supp. 795, 814-815 (C.D. Ill. 1985).

VII. Conclusion

In conclusion, I recommend that Respondent's motion to dismiss under Rule 9 be DENIED but that the petition for writ of habeas corpus be DENIED on the merits. In my opinion, Petitioner has not violated Rule 9 by either filing a delayed appeal or by abusing the writ. On the other hand, I do not believe that Petitioner has shown that he was prejudiced under the Strickland test due either to trial counsel's failure to present witnesses for the defense or appellate counsel's failure to raise an ineffective assistance of counsel claim in the appeal as of right.

The parties are advised that any objections to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy or further appeal from Judge Freeman's acceptance thereof is waived. United States v. Walters, 638 F.2d 947 (6th Cir. 1981). See also Thomas v. Arn, _U.S._, 106 S.Ct. 466 (1985).

THOMAS A. CARLSON
UNITED STATES MAGISTRATE

Dated: 4/25/86

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CURTIS CLARK,

Petitioner,

v. CIVIL ACTION NO. 83-CV-5515-DT

ROBERT REDMAN, HONORABLE RALPH M. FREEMAN

Respondent. Sept. 30, 1986

MEMORANDUM OPINION

On October 24, 1975, Petitioner was convicted by a jury of first-degree murder. Mich. Comp. Laws (Sec.) 750.316. He was sentenced by Detroit Recorder's Court Judge John L. Kadela to a term of life imprisonment. On April 22, 1977, the Michigan Court of Appeals affirmed. (Docket No. 26922). On November 30, 1977, with three dissents, the Michigan Supreme Court denied leave to appeal. 402 Mich. 817 (1977). Petitioner then filed his first petition for writ of habeas corpus in this Court

pursuant to 28 U.S.C. (Sec.) 2254. Civil Action No. 78-70688. The petition was denied by Judge Cornelia Kennedy on July 25, 1978. The Sixth Circuit affirmed on November 20, 1979. 611 F.2d 371 (6th Cir. 1979). Petitioner then returned to the state courts where he raised an ineffective assistance of counsel claim. An evidentiary hearing on this claim was held before Detroit Recorder's Court Judge Justin Ravitz on February 25, 1982. Judge Ravitz denied a delayed motion for a new trial. On October 28, 1982, the Michigan Court of Appeals denied leave to appeal. (Docket No. 65499), and on July 22, 1983, the Michigan Supreme Court denied leave to appeal. 417 Mich. 1065 (1983). Petitioner, presently confined at the Federal Correctional Institution at Lewisburg, then filed this second application for writ of habeas corpus, on November 30, 1983. In his brief in support of the

writ, Petitioner argued that he was denied effective assistance of counsel at trial because of trial counsel's failure to call alibi witnesses and Petitioner to the stand. Petitioner also claimed ineffective assistance of appellate counsel because appellate counsel failed to raise the issue of trial counsel's ineffectiveness. Respondent argued that there was effective assistance of counsel at trial and on appeal. Respondent moved for dismissal under Rule 9 of the Rules Governing Section 2254 cases on the grounds of delayed filing of the writ or abuse of the writ.

On March 29, 1985, this matter was referred to U.S. Magistrate Thomas A. Carlson for a report and recommendation pursuant to the Magistrate's Act, 28 U.S.C. 636(b). An evidentiary hearing on

the question of the applicability of Rule 9 and the merits of the ineffective assistance of counsel claim was held on August 26, 1985. A separate deposition of a witness was held on October 2, 1985. On April 25, 1986, Magistrate Carlson issued his report and recommended that Respondent's motion to dismiss under Rule 9 be denied and that the petition for writ of habeas corpus also be denied.

Respondent has not filed any objections to the Magistrate's Report. Petitioner, through his attorney, filed timely objections with this Court, requiring the Court to make a de novo review of those portions of the report to which Petitioner objects.[1] United States v.

---

[1] The Court will not address those items resolved by the Magistrate to which there were no objections. Therefore, this Memorandum Opinion will not discuss the Rule 9 issues or the issue regarding the ineffectiveness of appellate counsel. The Court will instead adopt the Magistrate's recommendation on those two issues.

Shami, 754 F.2d 670 (1985); Petitioner in propria persona, filed an additional set of objections beyond the requisite ten-day period, 28 U.S.C. 636(b). The Court therefore is not required to consider these late objections in its de novo review of the Magistrate's report.

Petitioner raises seven objections to the Magistrate's report and recommendations. Six of those objections relate to the credibility findings of the Magistrate regarding alibi witnesses and the witness Jackson-El. The remaining objection broadly disputes the recommendation that Petitioner has not shown ineffective assistance of trial counsel. Thus, the objections can essentially be grouped into two categories.

The first category of objections contains those in which Petitioner dis-

agrees with the Magistrate's finding that Petitioner's alibi witnesses were not credible. The Supreme Court has specifically held that 28 U.S.C. 636(b)(1) does not require the district court judge to conduct a de novo hearing in order to resolve credibility issues raised by the objections. United States v. Radditz, 447 U.S. 667, 676 (1980). See also Campbell v. United States District Court for the Northern District of California, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 879 (1974). Instead, when objections are made to the magistrate's credibility findings, "Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." Raddatz, 447 U.S. at 676. The Sixth Circuit has cautioned, however, that "[w]hen reviewing the evidence

adduced at the hearing before the magistrate, a district court must weigh the evidence for itself and make an independent determination of the dispositive issues." United States v. Shami, 754 F.2d 670, 672 (6th Cir. 1985).

After carefully reviewing the transcript of the evidentiary hearing, the Court is of the opinion that Magistrate Carlson's credibility determinations should be adopted. Initially, the Court recognizes that Magistrate Carlson had the opportunity to observe the demeanor of the witnesses as they testified. Just as the Court of Appeals "is obliged to place a good deal of reliance upon the fact-finding capability and the integrity of [a] trial judge who preside[s] at [an] evidentiary hearing," this Court is inclined to rely on the credibility determinations of a magistrate who performs

the fact-finding function. United States v. Williams, 754 F.2d 672, 676 (6th Cir. 1985). The transcript reveals a sound basis for Magistrate Carlson's reasons for discrediting the testimony of the alibi witnesses. Inasmuch as the Court is satisfied that Magistrate Carlson made his credibility determination after careful consideration of the testimony as a whole, this Court will adopt the Magistrate's recommendations on the credibility issue.

The second category of objections relates to the finding that Petitioner was not denied effective assistance of counsel. The standard for ineffective assistance of trial counsel is found in Strickland v. Washington, 466 U.S. 668, 687 (1984):

> First, the defendant must show that counsel's performance was

> deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

In elaborating on the application of the above standard to a particular case, the Supreme Court advised that

> [J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the

evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." (citations omitted).

* * *

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Id. at 689-690.

The Court is of the opinion that Petitioner has not presented sufficient evidence to overcome the strong presumption that his trial counsel provided reasonable professional assistance. The Petitioner is required to identify acts or omissions of counsel which do not comport with reasonable professional judgment. Petitioner identifies three acts and faults counsel for not having (1) called Petitioner to testify in his own behalf, (2) interviewed and secured Jackson-El as a witness, and (3) interviewed and secured his alibi witnesses.

With regard to the first act, Petitioner did not show that counsel's failure to call Petitioner to the stand was not reasonable professional judgment. Given Petitioner's prior criminal record

and the weaknesses of the prosecution's case, the decision to keep Petitioner off the witness stand was a matter of legitimate trial strategy. With regard to the second identified omission, even the decision not to call Jackson-El to testify on behalf of Petitioner was a matter of legitimate trial strategy. At the time of Petitioner's trial, Jackson-El was in prison. It was therefore appropriate for trial counsel to conclude that Jackson-El would not be a good witness (EHT, p 97). Thus in light of all the circumstances, Petitioner has not shown that trial counsel's conduct in not calling Petitioner or Jackson-El to the stand was beyond the wide range of professionally competent assistance.

The Court views the failure to call alibi witnesses as a potentially more serious allegation of ineffective assistance of counsel. Several cases in the

various circuits have held that the failure to call alibi witnesses was ineffective assistance of counsel. See Elridge v. Atkins, 665 F.2d 225 (8th Cir. 1981); Brown v. Blackburn, 625 F.2d 35 (5th Cir. 1980); Wilson v. Cowan, 578 F.2d 166 (6th Cir. 1977); McQueen v. Swenson, 560 F.2d 959 (8th Cir. 1977); Gomez v. Bateo, 462 F.2d 596 (5th Cir. 1975). In each of these cases, however, there was evidence that the attorney was actually given the names of the alibi witnesses before trial, or was contacted several times by the alibi witnesses themselves before trial. The attorney's subsequent failure to contact the alibi witnesses was correctly held to be ineffective assistance of counsel and petitioner's writ of habeas corpus was granted.

The case before the Court today is distinguishable from the previous cases.

In the instant case, there is not sufficient evidence to show that the trial attorney was aware of the existence of any alibi witnesses. There was no evidence tending to show that the trial attorney was aware of the fact that a previous attorney had withdrawn because of an inability to interview witnesses in Ohio. There is only conflicting evidence as to whether Petitioner actually told his trial attorney of the existence of alibi witnesses. Petitioner claims he told his attorney one time a few days before trial that there were people in Cleveland for the attorney to interview (EHT 94-96). A review of the transcript makes it apparent that the timing of this revelation, if it indeed occurred, put the attorney in an awkward position because 1) it was made only a few days before trial and an attorney must file a notice of a defense of alibi at least 10

days before trial. (Mich. Comp. Laws, [Sec.] 768.20, 768.21) and 2) it was made during an altercation between the attorney and the client Petitioner concerning the attorney's need for a copy of the preliminary hearing transcript. Petitioner did not raise the issue of an alibi defense himself at trial although he was a vocal and assertive defendant. Also, the alleged alibi witnesses did not come forward and identify themselves although two of them attended the trial on at least one occasion. The trial attorney, on the other hand, testified that he does not remember whether he was told about alibi witnesses or not, but that if he had been told, his normal practice would have been to look into the matter. (EHT 34-35). Inasmuch as the testimony presented at the evidentiary hearing on 8-26-85 indicates conflicts about what occurred some 12 years earlier and raises questions about whether any-

thing pertaining to an alibi was communicated to the attorney, the Court finds that Petitioner has failed to show that the conduct of his attorney was unreasonable. The Petitioner has not shown that his trial counsel's performance was deficient pursuant to the first prong of the Strickland test. Therefore, it is not necessary to discuss the second prong of whether counsel's performance prejudiced the defense by depriving Petitioner of a trial whose result is reliable.

Accordingly, and for the above reasons, the petition for writ of habeas corpus will be DENIED. An appropriate order will be issued.

RALPH M. FREEMAN
United States District Judge

Dated: Sept. 30, 86

NOT FOR
PUBLICATION

NO. 86-2050
THE UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed
Dec. 28 1988
Leonard Green,
Clerk

Dis. Ct. 83-5515

CURTIS LEE CLARK,

Petitioner-Appellant,

v.

ROBERT REDMAN,

Respondent-Appellee,

On Appeal
from the
United States
District Court
for the Eastern
District of
Michigan

BEFORE: ENGEL, MERRITT, and RYAN,

Circuit Judges.

RYAN, Circuit Judge. Petitioner appeals the denial of his petition for writ of habeas corpus. The district court found that petitioner had not made a sufficient showing to establish ineffective assistance of counsel. We reverse.

I.

A.

Petitioner Curtis Lee Clark was convicted of first-degree murder in Detroit Recorder's Court on October 24, 1975, and sentenced to life imprisonment. The prosecution presented fifteen witnesses, only one of whom implicated petitioner. That witness, although questioned at the time of the murder, did not tell the police of petitioner's alleged involvement until almost one year later. Petitioner's court-appointed trial counsel presented no witnesses, relying on cross-examination of the prosecution witness to establish petitioner's defense.

On appeal to the Michigan Court of Appeals, the trial counsel's law partner was appointed counsel for the petitioner.

Petitioner's conviction was affirmed and leave to appeal was denied by the Michigan Supreme Court. People v. Clark, 402 Mich. 817 (1977). Petitioner then sought a writ of habeas corpus in federal district court on grounds other than those raised here. The petition was denied and this court affirmed. Clark v. Anderson, 611 F.2d 371 (6th Cir. 1979).

Petitioner then brought a motion for new trial in the state trial court, based on a claim of ineffective assistance of counsel.[1] He relied upon three instances in which his trial counsel was allegedly constitutionally deficient: counsel (1) failed to call petitioner to testify

---

[1] Petitioner also claimed ineffective assistance of appellate counsel. Due to our resolution of the ineffective assistance of trial counsel claim, we need not address the claim regarding appellate counsel.

at trial in his own behalf;[2] (2) failed to investigate and interview a number of witnesses who would have provided petitioner with an alibi for the time of the murder; and (3) failed to investigate and interview a witness who would have directly contradicted the story told by the one prosecution witness who implicated petitioner in the murder. Following an evidentiary hearing in Detroit Recorder's Court, the motion for a new trial was denied. The Michigan Court of Appeals denied leave to appeal. The Michigan Supreme Court also denied leave to appeal. People v. Clark, 417 Mich. 1065 (1983).

A second petition for writ of habeas corpus was then filed in the federal district court for the Eastern District of

---

[2] Petitioner has apparently abandoned this claim on appeal.

Michigan, raising the ineffective assistance of counsel claim. Following an evidentiary hearing the magistrate issued a recommendation that the petition be denied. The district court adopted the magistrate's recommendation and petitioner now appeals.

B.

The one prosecution witness who implicated petitioner in the murder, Judy Mahone, testified that Augustus Jackson-El, known as "Little Jack," was with petitioner on the night of the murder. At the time of petitioner's trial, Little Jack was in state prison on unrelated charges. Neither the prosecutor nor the defense counsel called Little Jack as a witness at the trial. In a deposition taken in preparation for the habeas corpus hearing, Little Jack testified

that two police officers attempted to coerce him into testifying against petitioner to corroborate Judy Mahone's story. He refused to do so because her story was not true. Little Jack testified that on the night that he visited Judy Mahone, the night of the murder, petitioner was not with him.

Petitioner testified that he told his trial counsel about Little Jack and attempted to convince the attorney to interview him. However, counsel refused to do so, stating that Little Jack would not be a credible witness because he was in prison. Counsel testified that he could not recall whether petitioner mentioned Little Jack to him.

Petitioner's girlfriend at the time of the murder, Yvonne Hawkins Fair, testified at the evidentiary hearing that

she and the petitioner were in Cleveland, Ohio on the day the murder took place in Detroit. Her testimony was corroborated by her sister, her father, and a neighbor of her family in Cleveland, all of whom testified that petitioner was with the girlfriend visiting her family in Cleveland at the time of the murder.

Petitioner testified that he informed counsel of the existence of the Cleveland witnesses. Counsel testified that he could remember little, if anything, about petitioner's trial and he had no recollection of anything concerning the Cleveland witnesses. He further testified that he could not locate his files on the case.

Petitioner submitted an affidavit from William Price, counsel's predecessor as petitioner's attorney, stating that he

(Mr. Price) withdrew from his representation of petitioner because he was unable to go to Ohio to investigate witnesses on behalf of petitioner. However, there is no evidence in the record indicating whether petitioner's trial counsel knew the reason for Mr. Price's withdrawal.

At trial, petitioner made several pro se motions to the court to have his counsel removed from the case. At one point, he protested to the court, stating that "you hampered my defense by keeping me locked up and I can't find several of my witnesses." Petitioner did not, however, refer to the witnesses as "alibi" witnesses.

On direct appeal of his conviction, petitioner was represented, as we have said, by his trial counsel's partner, although it is not clear that petitioner

was aware at the time that the two appointed counsel were partners. Petitioner testified that he told his appellate counsel about the trial counsel's failure to interview and subpoena the alibi witnesses. The appellate counsel testified that he vaguely remembered something being said about an alibi defense, but, like trial counsel, had no firm recollection of petitioner's case, and he too could not locate his files.

II.

Strickland v. Washington, 466 U.S. 668 (1984), sets out the two-prong test for evaluating claims of ineffective assistance of counsel, which is applicable to the instant case.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so

> serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. In explaining the first prong of the test, the Supreme Court stated that "[t]he proper standard for attorney performance is that of reasonably effective assistance." Id. "[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. As to the second prong, the Court instructed that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome." Id. at 694. On review, findings of fact made by the district court are conclusive if not clearly erroneous. The performance and prejudice determinations, however, are questions of mixed law and fact and are therefore freely reviewable. Id. at 698.

III.

A.

There can be no question that the failure to reasonably investigate potentially exculpatory witnesses satisfies the deficiency prong of the Strickland test.

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In an effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.

Stickland, 466 U.S. at 691.

In this case, if petitioner's trial counsel decided not to investigate Little Jack and the Cleveland alibi witnesses, it was unquestionably an unreasonable decision, even after "applying a heavy measure of deference" to his judgment, which would have directly impeached the credibility of Ms. Mahone, the sole prosecution witness against petitioner. No reasonably competent trial attorney would have failed at least to interview Little Jack to determine what he had to say and whether he would make a credible witness. Similarly, the Cleveland alibi witnesses, if believed, would have completely exonerated petitioner. No reasonably competent counsel would have failed at least to investigate their stories.

Nevertheless, the district court

held that petitioner did not satisfy the first Strickland prong because he did not produce sufficient evidence that petitioner's trial counsel knew of the existence of either Little Jack or the Cleveland alibi witnesses. The district court concluded that there was "conflicting evidence as to whether petitioner actually told his trial attorney of the existence of alibi witnesses." The district court then listed four facts which it found mitigated against petitioner's claim that he told counsel about the witnesses: (1) if petitioner did mention it to counsel, he did so only a few days before trial and during the course of an altercation concerning the transcript; (2) petitioner did not mention the alibi defense although he did personally raise other objections to the court; (3) two of the alibi witnesses attended one day of the trial-the day the jury was selected;

and (4) trial counsel testified that although he didn't remember whether he was told about the witnesses, if he had been informed of such witnesses, his normal practice would have been to investigate.

We fail to see how these four propositions create any "conflicting evidence as to whether petitioner actually told his trial attorney of the existence of alibi witnesses." The first fact cited as "conflicting" with petitioner's testimony does not conflict at all. The fact that petitioner informed counsel about the witnesses on the eve of trial during an altercation over the transcript may have indeed placed counsel in "an awkward position," as the district court found, but it did not relieve him of his duty to investigate the witnesses as part of his responsibility to provide petitioner with "reasonably effective assist-

ance." Second, although he did not denominate them as "alibi" witnesses, petitioner did object to the trial court's "hampering" of his defense by preventing him from finding his witnesses. The district court's third "conflicting" fact, the appearance at trial of two of the alibi witnesses on the date of jury selection, has no bearing on the question whether petitioner told counsel of their existence. Finally, counsel's statement that his normal practice was to investigate potentially exculpatory witnesses is pure speculation. The question presented here is whether he knew about the witnesses in this case. His testimony is not probative on that issue because he stated that he could not remember.

Petitioner's testimony that he told counsel about the alibi witnesses is supported by the undisputed fact that he

told counsel's predecessor, Mr. Price, about them. Moreover, counsel's success or as appellate counsel, his law partner, testified that he vaguely remembered some mention of an alibi defense. Because petitioner's testimony that he told his trial counsel about the witnesses is uncontradicted, because he unquestionably mentioned them to both Price and Solomon, and because no conceivable reason exists for him to have withheld this information from his counsel, we hold that petitioner has produced sufficient evidence that his trial counsel knew about the witnesses and failed to investigate them. We hold that the district court clearly erred in concluding otherwise. Counsel's representation was therefore constitutionally infirm.

IV.

Besides showing that trial counsel's representation was deficient, petitioner must also establish that, but for the deficient representation, there is a reasonable probability the result would have been different. Strickland teaches that a reasonable probability is one which is "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In addition, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. at 696.

The record in this case reveals that only one witness was able to connect petitioner with the murder. No other evidence was presented at trial which would link petitioner to murder. This is

clearly not a case in which there is overwhelming support for the verdict. Had trial counsel investigated and presented the alibi witnesses at trial, there would have been several witnesses to contradict the one prosecution witness. Further, had trial counsel presented Little Jack, that one witness would have been directly impeached. At the very least, counsel's failure to investigate these exculpatory witnesses "undermines confidence in the outcome." It is reasonably probable that if these witnesses had testified at trial, petitioner would have been acquitted. For this reason, we hold that he has satisfied the prejudice prong of the Strickland test.

IV.

Trial counsel's failure to investigate the alibi witnesses and Little Jack

under the circumstances of this case, constituted constitutionally deficient representation and resulted in prejudice to the petitioner. Accordingly, the judgment of the district court is **REVERSED.** This case is **REMANDED** to the district court with instructions to issue the writ of habeas corpus.

No. 86-2050 Clark v. Redman

(Heard: 9/24/87)

ENGEL, Chief Judge, dissenting. I respectfully dissent.

More than fifteen years ago, on November 17, 1973, the body of Lillie Mae Friday was found in a vacant apartment in Detroit. She had been tied up and her neck was slashed. While a missing person's report had been filed by one Judy Malone, the crime remained unsolved until October 1974 after petitioner Clark had been arrested for a different crime. At that time, Ms. Malone gave a statement to the Detroit police which implicated the petitioner in Friday's murder. Malone claimed that she had been instructed to make out a missing person's report by Clark, who telephoned Malone, stating that he had killed Friday and left her

body in the nearby apartment of Jesse Howard.

While Ms. Malone was the only witness who testified specifically to Clark's involvement in the crime, her testimony was explicit. She testified that she first met Lillie Mae Friday on October 13, 1973 and that Friday lived with George Douglas, a boyfriend, in an apartment across the hall. Malone testified to an altercation between petitioner Clark and Lillie Friday, apparently attributable to Clark's belief that Friday had notified the police that Clark was an acquaintance of Douglas, who had earlier been arrested for murder: this provided the motive for Clark's murder of Lillie Mae Friday. Malone further testified that during the altercation, Clark went to get a gun but could not find one, returning later in the evening

with a man called "Little Jack," later identified as Augustus Jackson-El. According to Malone, Clark left the apartment, leaving Jackson-El with Friday and Malone; Clark did not return until after midnight. Upon returning, Clark stayed for a few minutes then left with Friday. Later, according to Malone, Clark telephoned Malone saying that he had killed Friday and left her body at Jesse Howard's apartment. He directed Malone to make out a missing person's report for Friday; Malone followed these instructions, making the report on November 16 to Detroit Police Officer James Quarles. At that time, she did not claim any further knowledge of the offense, but in October 1974, after Clark had been arrested for a different crime, she gave a further statement which implicated petitioner in the murder. Clark was arrested for Lillie Mae

Friday's murder on January 3, 1975 and was convicted on October 24, 1975 of first-degree murder following a trial in the Detroit Recorder's Court. He had counsel both at trial and on appeal. On April 22, 1977 the Michigan Count of Appeals affirmed. Petitioner then sought leave to appeal to the Michigan Supreme Court but leave was denied November 30, 1977, over three dissents (402 Mich. 817 (1977)). A pro se petition for writ of habeas corpus was then filed in federal court, denied by then District Judge Cornelia Kennedy on July 25, 1978, and affirmed on appeal by the Sixth Circuit in an unpublished order filed November 20, 1979. See 611 F.2d 371 (1979) (table).

Petitioner then returned to state court and raised an ineffective assistance of counsel claim for the first time.

An evidentiary hearing on this claim was held on February 25, 1982 before Detroit Recorder's Court Judge Justin Ravitz, who had not presided at the original trial. After taking testimony, Judge Ravitz denied a delayed motion for a new trial. Subsequent attempts by petitioner to appeal to the Michigan Court of Appeals and the Michigan Supreme Court were unsuccessful. Thereafter, on November 30, 1983, petitioner Clark filed a second application for writ of habeas corpus in the United States District Court for the Eastern District of Michigan. Upon referral to the United States Magistrate Thomas A. Carlson, an evidentiary hearing was held to determine whether (1) Clark had, under Rule 9 of the rules governing section 2254 cases, abused the writ of habeas corpus and (2) if not, the merits of his ineffective assistance of counsel claim. Magistrate Carlson held a hear-

ing on August 26, 1985 and also considered the separate deposition of Augustus Jackson-El, which was taken on October 2, 1985. In a twenty-nine page opinion, the magistrate recommended denial of the respondent's motion to dismiss under habeas Rule 9, but he also recommended denial of the writ of habeas corpus, concluding, "I do not believe that petitioner has shown that he was prejudiced under the Strickland test due either to trial counsel's failure to present witnesses for the defense or appellate counsel's failure to raise the ineffective assistance of counsel claim in the appeal as of right."

It is apparent from Magistrate Carlson's opinion that his conclusions were largely based upon an assessment of the credibility of the witnesses who were called upon to testify, including witnesses who petitioner now claims should

have been interviewed and called by his original trial counsel, whose failure in this regard, he claims, amounted to ineffective assistance of counsel within the meaning of Strickland v. Washington, 466 U.S. 668 (1984). Magistrate Carlson also had before him the record of proceedings and conclusions of Judge Ravitz concerning the charge that petitioner's trial counsel was ineffective by failing to interview and call Augustus Jackson-El. Magistrate Carlson particularly agreed with Judge Ravitz's conclusion that petitioner had not been prejudiced by this latter omission:

> The bottom line in terms of my analysis of Augustus Jackson's testimony is drawing, if you will, on the argument made by [the assistant prosecuting attorney], is that I'm not at all sure that Little Jack would have been a favorable witness to the Defense or that skillful and trained and competent criminal attorneys making an informed decision would have concluded

> that that issue ought to have been raised or that he ought to have been called.
>
> * * *
>
> Suffice it to say at this point, knowing what we know now, I don't think that any skilled trial lawyer would ever want to be in a position where he had to call as a witness Augustus Jackson, certainly not in a jury trial, and without belaboring the point, he certainly struck me as the sort of witness who offers very little in the way of credibility.

Carlson also concluded that Jackson-El "would not have made a credible witness and therefore the failure to call him did not prejudice petitioner."

On the question of whether petitioner's trial counsel provided ineffective assistance by failing to call alibi witnesses, both Judge Ravitz and Carlson agree that had the matter been called to the attention of trial counsel, it would have been prejudicial for counsel not to

have investigated and interviewed those witnesses. If anything is uncertain in the record of this case, it is whether in fact petitioner did apprise trial counsel of the existence of alibi witnesses and of his desire to call them in his own behalf. While petitioner's own recollection seems to have gained considerable clarity during the passage of time, the testimony of the attorneys involved, including prior attorneys, trial counsel and subsequent appellate counsel, was not nearly so clear. Apparently, the trial attorney's original notes had been destroyed when he was replaced by his former partner as appellate counsel. Trial counsel did testify, however, that if he had been told about the alibi he would have looked into it, a construction which Magistrate Carlson appears to have accepted as credible. Carlson also observed, however, that by petitioner's own

admission, assuming such an admission was credible at all, Clark did not tell his counsel about these witnesses until a few days before trial. Carlson found that if petitioner had actually told Carlson, even though shortly before trial, the latter would still have been under a duty to request a continuance to give the required ten day notice of alibi required by Michigan law. See Mich. Comp. Laws 768.20, 768.21. Magistrate Carlson commented that of all Clark's purported alibi witnesses, only Yvonne Hawkins Fair had testified at the hearing before Judge Ravitz; her testimony was that her son had a birthday party on November 13, 1973 and that she and the petitioner went to Cleveland on the following day November 14, the day of the murder, and therefore could not have been in Detroit at the time of the murder. Judge Ravitz made the following assessment of Fair's credibility:

> The trouble with the alibi testimony, in my judgment, and it's a very serious problem, is that I have the benefit of hearing from one of the many claimed alibi witnesses, and Miss Hawkins certainly projected well, a lot better than other Defense witnesses. But her memory of the date and her ability to recall it is glaringly deficient to say the very least, and I'm not going to pick apart the testimony, but I think that the record is real clear that the quality of the claimed alibi proofs is wanting.

After hearing many more witnesses, Magistrate Carlson fully concurred with this evaluation:

> The alibi testimony presented to me was simply not believable. Petitioner himself never raised the matter with the trial judge (although he had raised other matters on his own) and both Ms. Fair and her sister, Ms. Burrell, were aware Petitioner was on trial (even attending some of the sessions) and never mentioned the alibi to counsel...Fair could remember staying at her parent's home but not the particular motel in Akron...(Motels, of course, keep records which private homes do not). The testimony before me by all of the

> alibi witnesses, now 12 years after the fact, was so remarkably consistent in all (even minor) details that it appeared clearly prepared and rehearsed. Furthermore, if the witnesses were mistaken by even one day, the alibi would have been broken.

With respect to the witnesses, Carlson ultimately concluded that "even if [attorney] Stern had interviewed the Ohio alibi witnesses, it would have been competent legal advice not to call them, and even if they had been called, their testimony would not have been sufficiently believable that their absence could be said to have deprived Petitioner of a fair trial." While conceding that petitioner was entitled to the effective assistance of counsel he concluded:

> I do not believe that relief is warranted, however, because as found above, Petitioner's ineffective assistance of counsel claim is without merit, he was not prejudiced and therefore this claim should also be denied.

Senior United States District Judge Ralph M. Freeman, with whom objections to the Magistrate's Report and Recommendations had been filed, again carefully reviewed the case and in a nine-page opinion denied the petition for a writ of habeas corpus. In doing so, Judge Freeman quickly disposed of petitioner's claim that his counsel had been deficient in failing to call petitioner to the stand, noting petitioner's prior criminal record and the weaknesses of the prosecution case at the time, weaknesses which could have led a reasonable counsel to conclude that it was safer to put the government to its proof than to risk the obvious dangers of exposing petitioner's own record. Anyone reading the testimony of the petitioner, particularly the testimony given before Judge Ravitz, would be led to believe that he would be far from an ideal witness in his own

behalf. The same, Judge Freeman held, would have been true of Jackson-El who was also incarcerated and who, as noted by Magistrate Carlson, was also imprisoned at the time and was directly implicated in the murder through the testimony of Ms. Malone. He therefore found that "petitioner has not shown that trial counsel's conduct in not calling petitioner or Jackson-El to the stand was beyond the wide range of professionally competent assistance."

Turning finally to the failure to call alibi witnesses, Judge Freeman viewed this as a "potentially more serious allegation of ineffective assistance of counsel." Distinguishing other cited cases of ineffective assistance, Judge Freeman concluded:

> There was no evidence tending to show that the trial attorney was aware of the fact that a previous attorney had withdrawn be-

cause of an inability to interview witnesses in Ohio. There is only conflicting evidence as to whether Petitioner actually told his trial attorney of the existence of alibi witnesses. Petitioner claims he told his attorney one time a few days before trial that there were people in Cleveland for the attorney to interview...A review of the transcript makes it apparent that the timing of this revelation, if it indeed occurred, put the attorney in an awkward position because 1) it was made only a few days before trial and an attorney must file a notice of alibi at least 10 days before trial (Mich. Comp. Laws, (Sec.) 768.20, 768.21) and 2) it was made during an altercation between the attorney and the client Petitioner concerning the attorney's need for a copy of the preliminary hearing transcript. Petitioner did not raise the issue of an alibi defense himself at trial although he was a vocal and assertive defendant. Also, the alleged alibi witnesses did not come forward and identify themselves although two of them attended the trial on at least one occasion. The trial attorney, on the other hand, testified that he does not remember whether he was told about alibi witnesses or not, but that if he had been told, his normal practice would have been to look into the matter ...Inasmuch as the testimony presented at the evidentiary

> hearing on 8-26-85 indicates conflicts about what occurred some 12 years earlier and raises questions about whether anything pertaining to an alibi was communicated to the attorney, the Court finds that Petitioner has failed to show that the conduct of his attorney was unreasonable. The Petitioner has not shown that his trial counsel's performance was deficient pursuant to the first prong of the Strickland test. There- fore, it is not necessary to discuss the second prong of whether counsel's performance prejudiced the defense by depriving Petitioner of a trial whose result is reliable.

I certainly agree with the majority that this is a difficult case in which there is room for disagreement, but I cannot conclude that petitioner has carried his heavy burden of showing his entitlement to the relief sought, especially after the passage of so much time and especially after his case has been scrutinized at so many levels. I am certainly not convinced that any failure of counsel, if constitutionally deficient, rendered the result of the trial

unreliable within the meaning of Strickland, 466 U.S. at 687. Malone's testimony of the events preceeding the death, although not corroborated by any witnesses, are nonetheless corroborated by the circumstances: she did in fact file a missing person's report and her testimony concerning petitioner's statements as to his disposal of the body conformed with the discovery made by the police shortly after the murder.

What to me is so totally unconvincing about Clark's claims, however, is the inconsistency in the conduct of the petitioner himself. By his own admission, he waited until the eve of trial before mentioning the existence of other witnesses. Even then, he did not mention that these witnesses would validate his alibi. The incredibility of his alibi defense is further punctuated by the fact that at

least two of those witnesses, whom he years later called to testify, in fact attended his original trial on the murder charge. They could not have failed to recognize the importance of their testimony in exonerating him if his claim was true. Further, it staggers the imagination to believe that Clark, who was not unfamiliar with crime and plainly not bashful about speaking up, would have supinely sat by without clearly asserting his alibi, if in fact he had one. Is it any wonder that neither Magistrate Carlson nor Judge Ravitz, who actually heard the testimony of some of these witnesses, was able to credit this testimony?

I very well realize that not all of the fifteen-year delay in this case is the petitioner's fault. Much of it may be explained away, but not all: not Clark's failure to advise counsel of the

existence of alibi witnesses until shortly before his trial (even assuming he did); not of the failure of two of the alibi witnesses to come forward or seek to assist Clark even though they had enough interest to attend the murder trial itself; not Clark's failure to assert formally his alibi defense until many years later. It must be remembered that Clark already possessed an extensive criminal record and was no stranger to the courts or criminal procedures. Anyone like Clark who had an alibi with merit and who was charged with first-degree murder, albeit one year after the crime, would have immediately and very vocally asserted the defense to anyone who would hear it. Clark didn't expressly do so until many years later. In short, I cannot find any merit in his claims than Judge Freeman, Magistrate Carlson, Judge Ravitz, or the Michigan courts. I would affirm.

NO. 86-2050
THE UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed
Feb. 10 1989
Leonard Green,
Clerk

CURTIS LEE CLARK,	)	
	)	
Petitioner-Appellant,	)	
v.	)	ORDER
	)	
ROBERT REDMAN,	)	
	)	
Respondent-Appellee,	)	

BEFORE: ENGEL, Chief Judge; MERRITT and RYAN, Circuit Judges

The Court having received a petition for reharing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

NO. 88-1251

ROBERT G. REDMAN,

Petitioner,

v.

CURTIS LEE CLARK,

Respondent.

BRIEF IN OPPOSITION TO

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

KENNETH A. WEBB
Attorney for Respondent
Suite 112-A
2855 Coolidge
Troy, Michigan 48084
Telephone: (313) 643-0730

RECEIVED
MAY 11 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. SHOULD A PETITION FOR CERTIORARI BE GRANTED WHERE:

A.) THE PETITIONER FAILED IN THE COURTS BELOW TO RAISE OR OTHERWISE PROPERLY PRESERVE THE QUESTION PRESENTED FOR REVIEW; AND,

B.) THE PURELY FACTUAL NATURE OF THE QUESTION PRESENTED FOR REVIEW IS SPECIAL AND IMPORTANT ONLY TO THE PARTICULAR PARTIES?

II. WHETHER THE CREDIBILITY ASSESSMENT OF WITNESSES WHO WERE CALLED UPON TO TESTIFY AT EVIDENTIARY HEARINGS IN THE STATE TRIAL COURT AND FEDERAL DISTRICT COURT, (WHICH FORMED THE BASIS FOR THE CONCLUSIONS THAT TRIAL COUNSEL HAD RENDERED EFFECTIVE ASSISTANCE), WERE HISTORIAL FINDINGS OF FACT PRESUMED TO BE CORRECT UNDER 28 U.S.C. §2254(d)[28 U.S.D.S. §2254(d)]; AND/OR, WERE BINDING UPON THE SIXTH CIRCUIT COURT OF APPEALS UNDER THE CLEARLY ERRONEOUS STANDARD OF REVIEW OF FRCP RULE 52(a)?

PARTIES

The Petitioner, ROBERT G. REDMAN, at the time of the filing of Respondent's Petition for a Writ of Habeas Corpus, was the Warden of the Huron Valley Men's Facility, a prison complex maintained by the State of Michigan, Department of Corrections, located at 3201 Bemis Road, Ypsilanti, Michigan 48197. Tekler Miller was automatically substituted as the Petitioner in this case when she assumed interim office, replacing Robert G. Redman. U.S. Supr. Ct. Rule 40.3, 28 U.S.C.A.; FRCP Rule 25(d).

The Respondent, CURTIS LEE CLARK, also known as Prisoner Number 110340, is currently a prisoner of the State of Michigan, in custody of the Michigan Department of Corrections, and is currently incarcerated at the Huron Valley Men's Facility.

TABLE OF CONTENTS

		PAGE
Table of Authorities		i - iv
Constitutional and Statutory Provisions and Rules		1, 2
Statement of the Case		2 - 8
Reasons Against Granting the Writ		
I.	A. Petitioner Failed in the Courts Below to Raise or Properly Preserve the Question Presented for Review.	8 - 12
	B. The Purely Factual Nature of the Question Presented for Review is Special and Important Only to the Particular Parties, as Distinguished from the General Public.	12 - 15
II.	A. The Credibility Assessment of Witnesses Who Were Called Upon to Testify at the State Trial Court and Federal District Court Evidentiary Hearings, Which Formed the Basis for the Conclusions that Trial Counsel had Rendered Effective Assistance, Are Neither Historial Findings of Fact Presumed to be Correct Under 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)], nor Binding Upon the Sixth Circuit Court of Appeals Under the Clearly Erroneous Standard of Review of Rule 52(a) of the Federal Rules of Civil Procedure.	15 - 25
Conclusion		25, 26

TABLE OF AUTHORITIES

	PAGE
United States Constitution	
Amendment VI	1, 26
Amendment XIV, Sec 1	1, 26
U.S. Supreme Court Rules	
17, 28 U.S.C.A.	12, 14
19, 28 U.S.C.A.	14
40.3, 28 U.S.C.A	i
Statutes	
28 U.S.C. §636(b)[28 U.S.C.S. §636(b)]	9
28 U.S.C. §2254(d)[28 U.S.C.S. §2254(d)]	i, 1, 4, 8, 14, 15, 16, 19, 24
M.C.L.A. §750.316; M.S.A. §28.548	2
Cases	
Adickes v. S. H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)	10
American Surety Co. v. Baldwin, 287 U.S. 156, 77 L. Ed. 231, 53 S. Ct. 98 (1932) 86 ALR 298	11
Anderson v. Bessemer City, 470 U.S. 564, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)	18, 19, 21, 25
Baumgartner v. United States, 322 U.S. 665, 88 L. Ed. 1525, 64 S. Ct. 1240 (1944)	20
Blair v. Oesterlein Machine Co., 275 U.S. 220, 72 L. Ed. 249. 48 S. Ct. 87 (1927)	10
Bohardus v. Commissioner, 302 U.S. 34, 39, 82 L. Ed. 32, 58 S. Ct. 61 (1937)	17, 25
Boyd v. Dutton, 405 U.S. 1, 30 L. Ed. 755, 92 S. Ct. 759 (1972)	17
Brewer v. Williams, 430 U.S. 387, 51 L. Ed.2d 424, 97 S. C. 1232, rehearing denied, 431 U.S. 925, 53 L. Ed.2d 240, 97 S. Ct. 2200 (1977)	17
California v. Taylor, 353 U.S. 553, 557, n. 2., 1 L. Ed.2d 1034, 1037, 77 S. Ct. 1037 (1957)	10
Cardinale v. Louisiana, 394 U.S. 437, 22 L. Ed.2d 398, 89 S. Ct. 1161 (1969)	10
Clark v. Anderson, 611 F.2d 371 (6th Cir. 1979)[Table]	3
Columbe v. Connecticut, 367 U.S. 568, 605, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961)[Opinion of Frankfurter, J.]	26
Conway v. California Adult Authority, 396 U.S. 107, 24 L. Ed.2d 295, 90 S. Ct. 312, rehearing denied, 396 U.S. 1030, 24 L. Ed.2d 527, 90 S. Ct. 544 (1969)	15
Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed.2d 333, 100 S.C. 1708 (1980)	17

Cases (continued) PAGE

DeBacker v. Brainaird, 396 U.S. 28, 24 L. Ed.2d 148, 90 S. Ct. 163 (1969) 11

Drope v. Missouri, 420 U.S. 162, 174, 175, n. 10, 43 L. Ed.2d 103, 95 S. Ct. 896 (1975) 17

Dunegan v. United States, 264 U.S. 195, 200, 71 L. Ed. 996, 47 S. Ct. 566 (1927) 10

Durham v. United States, 401 U.S. 481, 28 L. Ed.2d 200, 91 S. Ct. 858 (1971) 12

Ellison v. Koswig, 276 U.S. 598, 72 L. Ed. 724, 48 S. Ct. 320 (1928) 11

Fay v. Noia, 372 U.S. 391, 9 L. Ed.2d 837, 83 S. Ct. 822 (1963) 12

Fowler v. Jago, 683 F.2d 983 (6th Cir. 1983), cert. denied, 460 U.S. 1098 (1984) 18

Giordenello v. United States, 357 U.S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245 (1958) 10

Helvering v. Rankin, 295 U.S. 123, 131, 79 L. Ed. 1343, 55 S. Ct. 732 (1935) 17, 25

Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491, 81 L. Ed.2d 755, 57 S. Ct. 569 (1937) 17

Houston Oil Co. v. Goodrich, 245 U.S. 440, 62 L. Ed. 2d 385, 38 S. Ct. 140 (1918) 15

Husty v. United States, 282 U.S. 694, 701, 702, 75 L. Ed. 629, 632, 633, 51 S. Ct. 240, 74 ALR 1407 (1931) 10

Johnson v. Salisbury, 448 F. 2d 374, 377 (6th Cir., 1971) 18

Kelley v. Southern Pacific Co., 419 U.S. 318, 322, 323, 42 L. Ed.2d 498, 505, 95 S.Ct. 472 (1974) 25

Kimmelman v. Morrison, 477 U.S. 365, 389, 91 L. Ed. 2d 305, 106 S.C. 2574 (1986) 17

Lawn v. United States, 355 U.S. 339, 2 L. Ed.2d 321, 78 S. Ct. 311, rehearing denied, 355 U.S. 967, 2 L. Ed. 2d 542, 78 S. Ct. 529 (1958) 10

Layne v. Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387. 67 L. Ed. 712, 43 S. Ct. 422 (1923) 15

Maggio v. Fulford, 462 U.S. 111, 76 L. Ed. 2d 794, 103 S. Ct. 2261 (1983)(Per Curiam) 18

Marshall v. Longberger, 469 U.S. 422, 432, 74 L. Ed. 2d 646, 657, 103 S. Ct. 843, 850 (1985) 18, 22

McCarthy v. Bruner, 323 U.S. 673, 89 L. Ed. 547, 65 S.C. 126 (1944) 11

McCullough v. Krannereer, 323 U.S. 327, 89 L. Ed. 2d 273, 65 S. Ct. 297 (1945) 11

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 84 L. Ed. 849, 60 S. Ct. 670 (1940) 10

Miller v. Fenton, 474 U.S. 104, 88 L. Ed.2d 405, 106 S. Ct. 445 (1985) 17 - 19, 26

Cases (continued) PAGE

Missouri P. R. Co. v. Hanna, 266 U.S. 184, 69 L. Ed. 235, 45 S.C. 36 (1924) 11

Monks v. New Jersey, 398 U.S. 71, 26 L. Ed.2d 54, 90 S.C. 1563 (1970) 11

Neely v. EBY Construction Co., 386 U.S. 317, 18 L. Ed. 2d 75, 87 S. Ct. 1072 (1967) 10

Neil v. Biggers, 409 U.S. 188, 193 n. 3, 34 L. Ed.2d 401, 93 S. Ct. 375 (1972) 13, 17

On Lee v. United States, 343 U.S. 747, 750, n. 3, 96 L. Ed. 1270, 1273, n. 3, 72 S. Ct. 967, 970 n. 3 (1952) 11

Palmieri v. Florida, 393 U.S. 218, 21 L. Ed.2d 389, 89 S. Ct. 611 (1968) 11

Pate v. Robinson, 383 U.S. 375, 385-386, 15 L. Ed.2d 815, 86 S. Ct. 836 (1966) 17

Patterson v. Mintzes, 717 F.2d 284, 386 (6th Cir., 1983) 9

Patton v. Yount, 467 U.S. 1025, 81 L. Ed.2d 847, 104 S. Ct. 2885 (1984) 18

People v. Clark, 417 Mich. 1065 (1983) 4

Ramsey et al. v. United Mine Workers of America, 401 U.S. 302, 28 L. Ed.2d 64 10

Rice v. Sioux City Memorial Park Cemetery, 349 U.S.70, 99 L. Ed. 897, 75 S. Ct. 614 (1955) 13, 14

Rudolph v. United States, 370 U.S. 269, 8 L. Ed.2d 484 82 S. Ct. 1277, reharing denied, 371 U.S. 854, 9 L. Ed.2d 93, 83 S. Ct. 15 (1962) 15

Rushen v. Spain, 464 U.S. 114, 120, 78 L. Ed.2d 267, 274, 104 S. Ct. 453, 465 (1983) (per curiam) 18

Schlesinger v. Councilman, 420 U.S. 738, 43 L. Ed.2d 591, 95 S. Ct. 1300 (1975) 10

Smith v. Butler, 366 U.S. 161, 6 . . Ed.2d 184, 81 S. Ct. 937, rehearing denied, 366 U.S. 941, 6 L. Ed. 2d 852, 81 S. Ct. 1657 (1961) 21

Southern Power Co. v. Public Service Co., 263 U.S. 508, 68 L. Ed. 413, 44 S. Ct. 164 (1924) 15

Stafos v. Jarvis, 477 F.2d 369, 372 (10th Cir. 1973) 18

Steagald v. United States, 451 U.S. 204, 208, 68 L. Ed.2d 38, 43, 101 S. Ct. 1642 (1981) 12

Strickland v. Washington, 466 U.S. 668, 80 L. Ed.2d 674, 104 S. Ct. 2052, rehearing denied, 467 U.S. 1267, 82 L. Ed.2d 864, 104 S. Ct. 3562 (1984) 6, 7, 12, 14 - 17, 19, 22, 24, 26

Sumner v Mata I, 449 U.S. 539, 66 L. Ed.2d 722, 101 S. Ct. 764 (1981)[Brennan, J., dissenting] 13

Sumner v Mata II, 455 U.S. 591, 597, 71 L. Ed.2d 480, 102 S. Ct. 1303 (1982) 24

Tacon v. Arizona, 410 U.S. 351, 3 L. Ed.2d 346, 93 S. Ct. 998 (1973) 10

Cases (continued) PAGE

Thomas v. Arn, 474 U.S. 140, 88 L. Ed. 435, 448, 449, 106 S. Ct. 456, rehearing denied, 474 U.S. 1111, 88 L. Ed.2d 933, 106 S. Ct. 899 (1985) 10

Townsend v. Sain, 372 U.S. 293, 309, n. 6, 9 L. Ed 2d 770, 83 S. Ct. 745 (1963) 16

Tyrrell v. District of Columbia, 2 3 U.S. 1, 61 L. Ed. 557, 37 S. Ct. 361 (1917) 10, 11

United States ex rel. Johnson v. Johnson, 531 F.2d 169, 174, n. 12 (3rd Cir., 1976) 18

United States v. Locasco, 431 U.S. 783, 52 L. Ed.2d 752, 97 S. Ct. 2044 (1977) 10

United States v. Martin, 704 F.2d 267, 275 (6th Cir., 1983) 9

United States v. United States Gypsum Co., 333 U.S. 364, 394, 395, 92 L. Ed. 746, 68 S. Ct. 525, rehearing denied, 333 U.S. 869, 92 L. Ed. 1147, 68 S. Ct. 788 (1948) 25

United States v. Walters, 638 F.2d 947 (6th Cir., 1981) 9

Wainwright v. Sykes, 433 U.S. 72, 87, 53 L. Ed.2d 594, 97 S. Ct. 2497 (1977) 17, 25, 26

Wainwright v. Witt, 469 U.S. 412, 429, 83 L. Ed.2d 841, 105 S. Ct. 844 (1985) 3

White v. Estelle, 459 U.S. 118, 74 L. Ed.2d 973, 103 S. Ct. 757 (1983)[Marshall, J., dissenting from denial of certiorari] 18

Rules

Rule 9 4, 7

FRCP Rule 25(d) 1

FRCP Rule 52(a) 2, 8, 14 - 17, 19, 24, 25

Text

1 Wigmore, Evidence §18 at 352 (3rd Ed., 1940) 11

Wright, Law of Federal Courts, 2d Ed., §96 19

Wright & Miller, Federal Practice and Procedure, Civil §§ 2588, 2589 19

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

This case involves Amendment VI to the Constitution of the United States which states, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained b law, and to be informed of the nature a d cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

This case also involves Section 1. of Amendment XIV to the Constitution of the United States which provides, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute involved in this case is 28 U.S.C. §2254(d)[28 U.S.C.S. §2254(d)] which provides, in material part, as follows:

> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction * * * shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> * * * * *
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> * * * * *
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made pertinent to a determination of the sufficiency of the evidence to support such factual determination, * * * and the federal court on a consideration of such part of the record as a whole concludes that

> such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) through (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

This case also involves FRCP Rule 52(a) which provides, in material part, as follows:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

STATEMENT OF THE CASE

Respondent, Curtis Lee Clark, was arrested on January 3, 1975 and was charged in the Recorder's Court for the City of Detroit with Murder in the First Degree. M.C.L.A. §750.316; M.S.A §28.548.

William Price was initially appointed by the trial court to represent Respondent on the charge. However, following the preliminary examination, and after consultation with Respondent, Mr. Price petitioned the trial court for permission to withdraw as counsel, inasmuch as his trial calendar would not permit him time to interview the several witnesses that Respondent had in the State of Ohio. Robert Stern was ultimately appointed to represent the Respondent at trial.

On the first day of trial, Respondent made several pro se motions to the trial court. Respondent at one point protested to the court that "[y]ou hampered my defense by keeping me locked up and I can't find several of my witnesses." Respondent did not, however, specifically refer to his witnesses as "alibi"

witnesses. The next day, Respondent asked the trial judge to discharge Mr. Stern and appoint another attorney, but the trial judge refused to do so.

The prosecution presented fifteen witnesses during the course of the trial. Only one witness, Judy Malone, implicated Respondent in the murder. Ms. Malone testified, inter alia, that Augustus Jackson-El, known as "Little Jack", was with Respondent on the night of the murder.

Little Jack, at the time of Respondent's trial, was serving a sentence in the State prison on an unrelated conviction. Neither the prosecutor, nor defense counsel, called Little Jack as a witness at the trial. Mr. Stern presented no witnesses at all.

On October 24, 1975, the jury convicted Respondent of first-degree murder. He was subsequently sentenced to a term of mandatory life imprisonment.

Barry Solomon, trial counsel's law partner, was appointed by the trial court to represent Respondent on direct appeal. Respondent's appeals were unsuccessful in the State courts He then sought a writ of habeas corpus in the federal district court, grounded on the same issues raised on direct appeal in the State courts. The petition was denied by the district court, and was affirmed by the Sixth Circuit Court of Appeals. Clark v. Anderson, 611 F.2d 371 (6th Cir., 1979)[Table].

Respondent returned to the State trial court where he filed a delayed motion for a new trial grounded on claims of ineffective assistance of trial and appellate counsel. He relied upon three instances in which his trial counsel was allegedly constitutionally deficient: (1) counsel failed to call Respondent to testify in his own behalf at trial (this claim was abandoned on appeal); (2) counsel failed to investigate and interview a number of witnesses who would have provided Respondent with an alibi for the time of the murder; and (3) counsel failed to investigate and interview a witness who would have directly contradicted the testimony of the one prosecution witness who implicated Respondent in the murder. Respondent claimed that he was deprived of effective assistance of appellate counsel by the refusal to raise on direct appeal the

issue of the ineffective assistance of trial counsel. However, following an evidentiary hearing in the Recorder's Court for the City of Detroit, the delayed motion for a new trial was denied. The Court of Appeals of Michigan and the Supreme Court of Michigan each denied Respondent's applications for leave to appeal. People v Clark, 417 Mich. 1065 (1983)

Respondent filed a second pro se petition for a writ of habeas corpus with the United States District Court for the Eastern District of Michigan, Southern Division, raising the ineffective assistance of trial and appellate counsel claims. Petitioner filed a Rule 9 motion to dismiss, claiming that the State had been prejudiced by Respondent's delay in bringing the effective assistance of counsel claims; and, that Respondent had abused the writ. Petitioner also argued that the conclusion of the State trial court following the evidentiary hearing on Respondent's claims of ineffective assistance of counsel was entitled to the presumption of correctness under 28 U.S.C. §2254 (d)[28 U.S.C.S. §2254(d)], and was binding upon the federal district court.

On March 29, 1985, the Honorable Ralph M. Freeman, District Court Judge, referred Petitioner's "presumption of correctness" claim to United States Magistrate Thomas A. Carlson who was also directed to conduct an evidentiary hearing "on both the threshold question of the applicability of Rule 9 and the merits of the ineffective assistance of counsel claim".

On August 26, 1985, Magistrate Carlson conducted the evidentiary hearing. On October 2, 1985, the deposition of Augustus Jackson-El was filed.

Respondent testified, at evidentiary hearing in both the State trial court and the federal district court, that he informed his trial counsel, Mr. Stern, of the existence of witnesses who could substantiate that he was with his girlfriend visiting her relatives in Cleveland, Ohio at the time the murder took place in Detroit, Michigan. He also told trial counsel about Little Jack and attempted to convince the attorney to interview and present him as a defense witness. However, according to Respondent, Mr. Stern

refused to do so, stating that Little Jack would not be credible witness because he was in prison. Trial counsel further informed Respondent that the prosecution did not have a case and it was not necessary to produce the Cleveland witnesses.

Respondent also testified that he told his appellate counsel, Mr. Solomon, about the existence of Little Jack, the Cleveland witnesses, and trial counsel's failure to investigate, interview and produce those witnesses at his trial. Respondent wanted Mr. Solomon to raise the issue of ineffective assistance of trial counsel on direct appeal. However, according to Respondent, Mr. Solomon told him that the ineffective assistance of trial counsel claim would be frivolous because "it might have been the best strategy in the world not to bring the witnesses".

Respondent's girlfriend at the time of the murder, Yvonne Hawkins Fair, testified at both evidentiary hearings that she and the Respondent were visiting her relatives in Cleveland, Ohio on the day the murder took place in Detroit, Michigan. Her testimony was corroborated at the evidentiary hearing conducted in the federal district court by her sister, her father and a neighbor of her family in Cleveland, Ohio.

Respondent's trial counsel, Mr. Stern, testified at both evidentiary hearings that he could not recall whether Respondent had mentioned Little Jack to him prior to trial. He also testified that he could remember little, if anything, about Respondent's trial, and he had no recollection of anything concerning the Cleveland witnesses. The trial transcript, p. 5, reveals that Mr. Stern was present in court when his client, the Respondent, stated to the Court that the Court "hampered my defense in keeping me locked up, and I can't find several of my witnesses. * * * " Mr. Stern's presence at the time of this statement was not brought to the attention of Magistrate Carlson, Judge Freeman or the Sixth Circuit Court of Appeals. Mr. Stern further testified that he could not locate his files on the case. There is no evidence in the record indicating whether Mr. Stern reviewed the court file, or otherwise knew the reason for Mr. Price's withdrawal as original trial counsel in this case.

Appellate counsel, Mr. Solomon, testified at both evidentiary hearings. He testified at the State court evidentiary hearing that he did not remember Respondent complaining about his trial representation. However, at the Federal evidentiary hearing he testified that he vaguely remembered Respondent telling him something about an alibi defense. He testified that he must have asked Mr. Stern about the matter and was satisfied with his law partner's answer, as he did not raise the ineffective assistance of counsel issue on direct appeal. But, like Mr. Stern, he had no firm recollection of Respondent's case, and he, too, could not locate his files.

Mr. Jackson-El testified personally at the State court evidentiary hearing, and by deposition in Federal District Court, that two police officers attempted to coerce him into testifying against Respondent to corroborate the testimony of Ms. Malone. He refused to do so because her story was not true. Mr. Jackson-El testified that on the night he visited Ms. Malone, the night of the murder, Respondent was not with him.

On April 25, 1986, Magistrate Carlson issued his Magistrate's Report and Recommendation. In addressing and rejecting the merits of Petitioner's presumption of correctness claim, Magistrate Carlson determined that the State court's findings of fact after the evidentiary hearing did not adequately develop and resolve the factual issues. (Appendix A, page 29a) Magistrate Carlson also reasoned that the State finding was not fairly supported by the record because it was "very difficult to determine whether the trial judge rejected (Respondent's) allegations that he told Mr. Stern about his witnesses or whether he accepted these allegations but denied his claim as a matter of law." (Appendix A, page 29a) Magistrate Carlson noted also that under Strickland v. Washington, 466 U.S. 668, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1984), questions of ineffective assistance of counsel are generally mixed questions of law and fact which are not entitled to the presumption of correctness. (Appendix A, page 29a) Magistrate Carlson also pointed out that it was questionable whether the State court applied the correct legal standard to Repondent's ineffective

assistance of counsel claims as Strickland was not decided until almost two years after the State court hearing. Consequently, he concluded, "the statutory presumption of correctness should not apply in this case." (Appendix A, page 34a) Magistrate Carlson also recommended that Petitioner's Rule 9 Motion to Dismiss should be denied; and, that Respondent's Petition for a Writ of Habeas Corpus should also be denied. (Appendix A, page 52a)

The last paragraph of the Magistrate's Report and Recommendation contained the following notice:

> "The parties are advised that any objections to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy or further appeal from Judge Freeman's acceptance thereof is waived. United States v. Walters, 638 F.2d 947 (6th Cir. 1981). See also Thomas v. Arn, U.S., 106 S. Ct. 466 (1985)."

(Appendix, page 53a)

On May 5, 1986, Respondent, through his attorney, filed his objections to the Magistrate's Report and Recommendation. In addition, on June 11, 1986, Respondent, in propria persona, also filed a letter containing objections intended to supplement those previously filed by his attorney. Petitioner did not file any objections to the Magistrate's Report and Recommendation.

On September 30, 1986, District Judge Freeman filed a Memorandum Opinion adopting the Magistrate's recommendation and entered an Order denying Respondent's Petition for a Writ of Habeas Corpus. (Appendix B)

Respondent filed an appeal with the United States Sixth Circuit Court of Appeals upon the District Court's Order denying his Petition for a Writ of Habeas Corpus. Petitioner did not cross-appeal, or claim in his opposing Brief on Appeal, the conclusion of the District Court that the findings of the State Court were not entitled to the statutory presumption of correctness. Instead, Petitioner relied upon the District Court's findings of fact and conclusions of law to prevail on appeal. However, the Sixth Circuit Court of Appeals reversed and remanded this case to the District Court with instructions to issue the writ of habeas corpus. (Appendix C) The mandate was issued on February 21, 1989.

Petitioner filed a Petition for Rehearing with suggestion for rehearing en banc in which he raised for the first time in the Sixth Circuit Court of Appeals that the findings of the State trial court were entitled to the statutory presumption of correctness under 28 U.S.C. §2254(d)[28 U.S.C.S. §2254(d)].

On February 10, 1989, the Sixth Circuit Court of Appeals denied Petitioner's Petition for Rehearing en banc. (Appendix D) On March 15, 1989, the Sixth Circuit Court of Appeals issued an Order recalling the mandate pending discretionary review by this Honorable Court.

Petitioner has now filed a Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals with this Honorable Court.

* * *

REASONS AGAINST GRANTING THE WRIT

I.

A. Petitioner Failed in the Courts Below to Raise or Properly Preserve the Question Presented for Review.

The question Petitioner presents to this Honorable Court for review is whether conclusions made by the State trial court and Federal District Court after evidentiary hearings upon the merits of claims of ineffective assistance of counsel are entitled to presumed to be correct under 28 U.S.C. §2254(d)[28 U.S.C.S. §2254(d)]; and/or, are binding upon the Sixth Circuit Court of Appeals under Rule 52(a) of the Federal Rules of Civil Procedure.

The Magistrate's Report and Recommendation, which was adopted by the District Court, found that the statutory presumption of correctness did not apply to this case. Petitioner filed no objections to the Magistrate's Report and Recommendation.

Respondent sought review of the District Court's final Order denying his Petition for a Writ of Habeas Corpus in the Sixth Circuit Court of Appeals. Petitioner had the opportunity to file a cross-appeal suggesting, as he does now, that the credibility determinations and conclusions of the State trial court and Federal District Court are entitled to the statutory presumption of correctness; and/or, are binding upon the Sixth Circuit Court

of Appeals under the "clearly erroneous" standard of review. However, Petitioner never sought to correct the adopted Magistrate's opinion on appeal, nor did he argue that the District Court's conclusions were binding upon the Court of Appeals. Instead, Petitioner acquiesced in the Magistrate's and District Court's view of Respondent's ineffective assistance of counsel claims and argued in support of that view in the Sixth Circuit Court of Appeals. Then, when his argument failed, Petitioner sought to revive his present presumption of correctness claim by raising it for the first time in the Sixth Circuit Court of Appeals in a Petition for Rehearing with suggestion for rehearing en banc. Now, Petitioner seeks to resurrect the presumption of correctness claim in this litigation by way of certiorari in this Court. In addition, he has added the alternative claim for the first time in this litigation, that the conclusions of the Federal District Court are binding upon the Sixth Circuit Court of Appeals under the "clearly erroneous" standard of review.

Petitioner, through his assertions, concessions, omissions, and acquiescence in the opinions of the courts below, has lost his standing to now claim that he is either entitled to the statutory presumption of correctness, or that the conclusions of the Federal District Court are binding upon the Sixth Circuit Court of Appeals under the "clearly erroneous" standard of review. Petitioner has failed to properly preserve this two-prong attack by raising the question consistently or in a timely fashion during the course of this litigation.

In United States v. Walters, 638 F2d 947 (6th Cir., 1981), the Sixth Circuit Court of Appeals established the prospective rule that failure of a party to file timely objections to the Magistrate's Report and Recommendation with the District Court within ten (10) days after they are served with a copy waives subsequent review in the Court of Appeals. 28 U.S.C.§636(b) [28 U.S.C.S. §636(b)]. See also Paterson v. Mintzes, 717 F.2d 284, 286 (6th Cir., 1983); United States v. Martin, 704 F.2d 267, 275 (6th Cir., 1983).

In Thomas v. Arn, 474 U.S. 140, 88 L.Ed.2d 435, 106 S. Ct. 466, rehearing denied, 474 U.S. 1111, 88 L.Ed.2d 933, 106 S. Ct. 899 (1985), this Court affirmed the sound reasoning implementing the Sixth Circuit's procedural waiver rule as "a valid exercise of supervisory power that does not violate either the Federal Magistrate's Act or the Constitution." Id., 474 U.S. at 155; 88 L.Ed.2d at 448-449.

This Court has adopted a similar waiver rule by traditionally denying certiorari on issues which have not been raised in the courts below, or which were otherwise not properly preserved for review in the Supreme Court. Tyrrell v. District of Columbia, 243 U.S. 1, 61 L.Ed 557, 37 S. Ct. 361 (1917); Husty v. United States, 282 U.S. 694, 701-702, 75 L.Ed. 629, 632-633, 51 S. Ct. 240, 74 ALR 1407 (1931); California v. Taylor, 353 U.S. 553, 557, n.2, 1 L.Ed2d 1034, 1037, 77 S. Ct. 1037 (1957); Giordenello v. United States, 357 U.S. 480, 2 L.Ed.2d 1503, 78 S. Ct. 1245 (1958); Lawn v. United States, 355 U.S. 339, 2 L.Ed.2d 321, 78 S. Ct. 311, rehearing denied, 355 U.S. 967, 2 L.Ed.2d 542, 78 S. Ct. 529 (1958); Neely v. EBY Construction Co., 386 U.S. 317, 18 L.Ed.2d 75, 37 S. Ct. 1072 (1967); Cardinale V. Louisana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S. Ct. 1161 (1969); Adickes v. S. H. Kress & Co., 398 U.S. 144, 26 L.Ed.2d 142, 90 S. Ct. 1598 (1970); Ramsey et al. v. United Mine Workers of America, 401 U.S. 302, 28 L.Ed.2d 64, 91 S. Ct. 658 (1971); Tacon v. Arizona, 410 U.S. 351, 35 L.Ed.2d 346, 93 S. Ct. 998 (1973); Schesinger v. Councilman, 420 U.S. 738, 43 L.Ed.2d 591, 95 S. Ct. 1300 (1975); United States v. Lovasco, 431 U.S. 783, 52 L.Ed.2d 752, 97 S. Ct. 2044 (1977). Cf., Duignan v. United States, 274 U.S. 195, 200, 71 L.Ed. 996, 47 S. Ct. 566 (1927); Blair v. Oesterlein Machine Co., 275 U.S. 220, 72 L.Ed. 249, 48 S. Ct. 87 (1927); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 84 L.Ed. 849, 60 S. Ct. 670 (1940).

This Court has also consistently dismissed a Petition for a Writ of Certiorari as improvidently granted once it was determined that the issue upon which certiorari had been granted had not been raised in the courts below or was otherwise not properly preserved for review by this Court. Tyrrell v. District of Columbia, 243 U.S.

1, 61 L.Ed. 557, 37 S. Ct. 361 (1917); McCarthy v. Bruner, 323 U.S. 673, 89 L.Ed. 457, 65 S. Ct. 126 (1944); McCullough v. Krannereer Corp., 323 U.S. 327, 89 L.Ed. 273, 65 S. Ct. 297 (1945); Palmieri v. Florida, 393 U.S. 218, 21 L.Ed. 2d 389, 89 S. Ct. 440, rehearing denied, 393 U.S. 1045, 21 L.Ed.2d 596, 89 S. Ct. 611 (1968); DeBacker v. Brainard, 396 U.S. 28, 24 L.Ed.2d 148, 90 S. Ct. 163 (1969).

It is true that Petitioner argued in support of the views of the State trial court and Federal District Court in the Sixth Circuit Court of Appeals. However, a general argument is wholly insufficient to properly raise or preserve the specific claims that the State trial court and Federal District Court credibility determinations and conclusions are entitled to the presumption of correctness and/or are binding upon the Sixth Circuit Court of Appeals. On Lee v. United States, 343 U.S. 747, 750, n. 3, 96 L.Ed 1270, 1273, n. 3, 72 S. Ct. 967, 970, n. 3 (1952). See also, 1 Wigmore, Evidence §18, at 352 (3rd Ed., 1940).

It is equally true that Petitioner specifically raised his present claims in the Sixth Circuit Court of Appeals in his Petition for Rehearing en banc. However, this Court has traditionally refused to consider issues presented for the first time on rehearing. American Surety Co. v. Baldwin, 287 U.S. 156, 77 L.Ed. 231, 53 S. Ct. 98 (1932) 86 ALR 298; Missouri P. R. Co. v. Hanna, 266 U.S. 184, 69 L.Ed. 235, 45 S. Ct. 36 (1924); Ellison v. Koswig, 276 U.S. 598, 72 L.Ed. 724, 48 S. Ct. 320 (1928); Monks v. New Jersey, 398 U.S. 71, 26 L.Ed.2d 54, 90 S. Ct. 1563 (1970).

Petitioner chose to defend the Magistrate's and District Court's view of Respondent's ineffective assistance of counsel claims before the Sixth Circuit Court of Appeals. However, having failed to prevail in the Court of Appeals on that argument, Petitioner now desires to revert to his original argument that the conclusions of the State trial court are entitled to the statutory presumption of correctness; and/or raise the new claim that the determinations and conclusions of the Federal District Court are binding upon the Sixth Circuit Court of Appeals under the "clearly erroneous" standard of review. In this manner, Petitioner is relieved of the

task of attempting to defend before this Court the clearly erroneous view of the District Court against the majority opinion of the Sixth Circuit Court of Appeals. This procedure, if condoned, also has the tactical advantage of allowing Petitioner to "sandbag" the Sixth Circuit Court of Appeals by failing to first present his claims in that court.

In Steagald v. United States, 451 U.S. 204, 208, 68 L.Ed.2d 38, 43, 101 S. Ct. 1642 (1981), this Court refused to consider the Government's claims that the petitioner in that case had no expectation of privacy in a house sufficient to prevail on a Fourth Amendment claim. This Court held that the Government had lost its right to challenge the Petitioner's assertion that he possessed a legitimate expectation of privacy in the searched home when the Government had made contrary assertions in the courts below, acquiesced in contrary findings by those courts, and failed to raise the challenge in a timely fashion during the litigation.

In the instant case, the Petition for a Writ of Certiorari should be denied because Petitioner has failed to properly raise or preserve the question in the courts below which he now presents for review by this Honorable Court.

B. The Purely Factual Nature of the Question Presented for Review is Special and Important Only to the Particular Parties, as Distinguished from the General Public.

This Court's review by a writ of certiorari is not a matter of right, but of judicial discretion, Durham v. United States, 401 U.S. 481, 28 L.Ed.2d 200, 91 S. Ct. 858 (1971), and will be granted only when there are special and important reasons, Fay v. Noia, 372 U. S. 391, 9 L.Ed.2d 837, 83 S. Ct. 822 (1963). See also, U.S. Supr. Ct. Rule 17, 28 U.S.C.A.

In this case, the Petition for a Writ of Certiorari involves no more than an expression of Petitioner's personal dissatisfaction with the Sixth Circuit Court of Appeals' application of issues of fact to the performance and prejudice components of the ineffective assistance of counsel analysis enunciated by this Court in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct.

2052, rehearing denied, 467 U.S. 1267, 82 L.Ed.2d 864, 102 S. Ct. 3562 (1984). Therefore, it should be clear by the purely factual nature of this case that it is special and important only to the particular parties, as distinguished from the general public; and, as such, does not raise a question of constitutional dimension warranting review on certiorari. Rice v. Sioux City Memorial Park Cementry, 349 U.S. 70, 99 L.Ed. 897, 75 S. Ct. 614 (1955).

The factual findings of the Federal District Court are set forth in the Magistrate's Report and Recommendation, including those pertaining to witness credibility. The findings of the District Court essentially supplement the roughly corresponding findings of the State trial court. The findings of fact set forth in the majority opinion of the Sixth Circuit Court of Appeals, including those pertaining to witness credibility determinations, are drawn from the record and do not conflict with, or contradict, any findings of basic, primary, or historical facts made by either the State trial court or the Federal District Court. There is also no apparent legal dispute between the lower courts as to the correct application of the constitutional principles enunicated by this Court in Strickland, supra, pertaining to the analysis of an ineffective assistance of counsel claim.

The dispute between the parties, and the difference of opinion between the Sixth Circuit Court of Appeals and the two lower courts, arises not so much over the elemental facts of this case, or the appropriate application of constitutional principles, as it does over the varying significance to be attached to those facts in application to the performance and prejudice components of the ineffectiveness analysis. Neil v. Biggers, 409 U.S. 188, 193, n. 3, 34 L.Ed.2d 401, 93 S. Ct. 375 (1972); Sumner v. Mata I, 449 U.S. 539, 66 L.Ed.2d 722, 101 S. Ct. 764 (1981) [Brennan, J., dissenting].

In short, the subject matter of this case does not involve conflicts of decisions with other courts on the same issue conflicts with applicable decisions of this Court; or, even a federal question of substance. But, rather, the subject matter involves strictly an interpretation of the facts of this case as they apply to the

performance and prejudice components of the ineffectiveness of counsel analysis. The Sixth Circuit Court of Appeals' opinion differs from the two lower courts only as to the application of the evidence adduced at both evidentiary hearings, which was either overlooked or ignored by the State trial court and the Federal District Court, to the performance and prejudice components of the ineffective assistance of counsel analysis.

Petitioner attempts to raise the constitutional stature of this case, and give the issue an illusion of "a federal question of substance", by inviting this Court to utilize this case as a vehicle to issue a purely hypothetical and academic advisory opinion to "delineate more fully the principles regarding questions of 'fact' and questions of 'law' as they relate to the presumption of correctness and the clearly erroneous standard for federal review." See Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals, page 40.

In this case, however, the usual deference analysis under either 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)] or Rule 52(a) of the Federal Rules of Civil Procedure is not necessary as the presumption of correctness and the clearly erroneous standard of review do not apply to mixed questions of law and fact involved in the performance and prejudice components of the ineffectiveness analysis. Strickland v. Washington, supra, 446 U.S. at 698, 80 L.Ed.2d at 700, 104 S. Ct. at 2070.

In dismissing a writ of certiorari as improvidently granted in Rice v. Sioux City Memorial Park Cementery, supra, this court referred to the requirement of U.S. Supr Ct. Rule 19 (percursor to U.S. Supr. Ct. Rule 17), that there be "special and important reasons" for granting a writ of certiorari. The Court also referred to the provision relating to a State court decision of "a federal question of substance" in the sense that, abstractly considered, it might present an intellectually interesting and solid problem, but that the Supreme Court did not sit to satisfy a scholarly interest in such issues, nor did it sit for the benefit of particular litigants. It was noted that "special and

important reasons" implied a reach to a problem beyond the academic, episodic, or hypothetical, and that this was especially true where the issues involved reached constitutional dimensions, for then there came into play regard for the Supreme Court's duty to avoid decisions of constitutional issues unless avoidance became evasion. It was concluded that if a recently enacted State statute had been properly brought to the Supreme Court's attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly been brought to the Supreme Court in the first instance See also, Conway v. California Adult Authority, 396 U.S. 107, 24 L.Ed.2d 295, 90 S. Ct. 312, rehearing denied, 396 U.S. 1030, 24 L.Ed.2d 527, 90 S. Ct. 544 (1969).

The purely factual nature of this case obviously involves only the application of facts to the constitutional principles enunciated in Strickland, and is special and important only to the particular parties, and not to the general public. The appropriate disposition in such a situation is to deny the Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals inasmuch as a review of the facts would be of no importance except to the immediate litigants. Houston Oil Co. v. Goodrich, 245 U.S. 440, 62 L.Ed. 385, 38 S. Ct. 140 (1918); Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 67 L.Ed. 712, 43 S. Ct. 4 2 (1923); Southern Power Co. v. Public Service Co., 263 U.S. 508, 68 L.Ed. 413, 44 S. Ct. 164 (1924); Rudolph v. United States, 370 U.S. 269, 8 L.Ed.2d 484, 82 S. Ct. 1277, rehearing denied, 371 U.S. 854, 9 L.Ed.2d 93, 83 S. Ct. 15 (1962).

II.

A. The Credibility Assessment of Witnesses Who Were Called Upon to Testify at the State Trial Court and Federal District Court Evidentiary Hearings, Which Formed the Basis for the Conclusions that Trial Counsel had Rendered Effective Assistance, Are Neither Historical Findings of Fact Presumed to be Correct Under 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)], nor Binding Upon the Sixth Circuit Court of Appeals Under the Clearly Erroneous Standard of Review of Rule 52(a) of the Federal Rules of Civil Procedure.

The crux of Petitioner's argument is that the State trial court's assessment of the credibility of witnesses who were called upon to testify at the State evidentiary hearing, which formed the basis for rejecting Respondent's claims that the performance of his trial counsel had been deficient, and had been prejudiced by that deficient performance, are historical findings of fact entitled to be presumed to be correct under 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)]. Petitioner alternatively argues that, even if the statutory presumption of correctness does not apply in this case, the roughly corresponding witness credibility assessments made at the evidentiary hearing conducted in the Federal District Court, which essentially supplements the determinations of the State trial court, are subject to the deference requirement of Rule 52(a) of the Federal Rules of Civil Procedure under the clearly erroneous standard of review.

In a federal habeas corpus challenge to a State criminal judgment, State court findings of fact made in the course of deciding a claim of ineffective assistance of counsel are subject to the requirements of 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)]. Strickland v. Washington, 466 U.S. 668, 698, 80 L.Ed.2d 674, 700, 104 S. Ct. 2052, 2070, rehearing denied, 467 U.S. 1267, 82 L.Ed.2d 864, 104 S. Ct. 3562 (1984). Similarly, Federal District Court findings of fact made in the course of deciding whether counsel rendered effective assistance are subject to the clearly erroneous standard of review under Rule 52(a) of the Federal Rules of Civil Procedure. Id., 466 U.S. at 698, 80 L.Ed.2d at 700, 104 S. Ct. at 2070. Those antecedent findings, which either a federal district court or court of appeals may be required to accept, are limited to what are termed "basic, primary, or historical facts". Townsend v. Sain, 372 U. S. 293, 309, n. 6, 9 L.Ed.2d 770, 83 S. Ct. 745 (1963). The performance and prejudice components underlying the ultimate determination of whether counsel rendered effective assistance under the Sixth Amendment are mixed questions of law and fact which are not entitled to the presumption of correctness under 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)], or subject to

the clearly erroneous standard of review under Rule 52(a) of the Federal Rules of Civil Procedure. Id., 466 U.S. at 698, 80 L.Ed.2d at 700, 104 S. Ct. at 2070. See also, Kimmelman v. Morrison, 477 U.S. 365, 389, 91 L.Ed.2d 305, 106 S. Ct. 2574 (1986).

The history of cases coming before this Court, both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, particularly those relating to claims of ineffective assistance of counsel, all hold that conclusions which involve mixed questions of law and fact require independent federal determination and full appellate review, and are not subject to the presumption of correctness. Helvering v. Rankin, 295 U.S. 123, 131, 79 L.Ed. 1343, 55 S. Ct. 732 (1935); Bohardus v. Commissioner, 302 U.S. 34, 39, 82 L.Ed. 32, 58 S. Ct. 61 (1937); Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491, 81 L.Ed. 755, 57 S. Ct. 569 (1937); Pate v. Robinson, 383 U.S. 375, 385-386, 15 L.Ed.2d 815, 86 S. Ct. 836 (1966); Boyd v. Dutton, 405 U.S. 1, 30 L.Ed.2d 755, 92 S. Ct. 759 (1972) [waiver of right of counsel]; Neil v. Biggers, 409 U.S. 188, 193, n. 3, 34 L.Ed.2d 401, 93 S. Ct. 375 (1972); Drope v. Missouri, 420 U.S. 162, 174-175, n. 10, 43 L.Ed.2d 103, 95 S. Ct. 896 (1975); Brewer v. Williams, 430 U.S. 387, 51 L.Ed.2d 424, 97 S. Ct. 1232, rehearing denied, 431 U.S. 925, 53 L.Ed.2d 240, 97 S. Ct. 2200 (1977) [waiver of right to counsel required application of constitutional principles to the facts of the case]; Wainwright v. Sykes, 433 U.S. 72, 87, 53 L.Ed.2d 594, 97 S. Ct. 2497 (1977); Cuyler v. Sullivan, 446 U.S. 335, 64 L.Ed.2d 333, 100 S. Ct. 1708 (1980)[multiple representation of criminal defendants by defense counsel was a mixed question of law and fact that required application of legal principles to the historical facts of the case and was not entitled to the presumption of correctness]; Strickland v. Washington, 466 U.S. 668, 698, 80 L.Ed.2d 674, 700, 104 S. Ct. 2052, 2070, rehearing denied, 467 U.S. 1267, 82 L.Ed.2d 864, 104 S. Ct. 3562 (1984) [ineffective assistance of counsel question is not a finding of fact entitled to presumption of correctness]; Miller v. Fenton, 474 U.S. 104, 88 L.Ed.2d 405, 106 S. Ct. 445 (1985); Kimmelman v. Morrison, 477 U.S. 365, 91 L.Ed.2d

305, 106 S. Ct. 2574 (1986) [statement of trial judge at suppression hearing not a finding of fact entitled to the presumption of correctness in ineffective assistance of counsel claim]. See also, White v. Estelle, 459 U.S. 118, 74 L.Ed.2d 973, 103 S. Ct. 757 (1983) [Marshall, J., dissenting from denial of certiorari]; Johnson v. Salisbury, 448 F.2d 374, 377 (6th Cir., 1971); Stafos v. Jarvis, 477 F.2d 369, 372 (10th Cir., 1973); United States ex rel. Johnson v. Johnson, 531 F.2d 169, 172, n. 12 (3rd Cir., 1976); Fowler v. Jago, 683 F.2d 983 (6th Cir., 1983), cert. denied, 460 U.S. 1098 (1984).

Petitioner believes that a substantial body of contrary precedent is controlling in this case in light of this Court's intermittent holdings addressing the scope of the presumption of correctness. Maggio v. Fulford, 462 U. S. 111, 76 L.Ed.2d 794, 103 S. Ct. 2261 (1983)(per curiam)[competency to stand trial]; Rushen v. Spain, 464 U.S. 114, 120, 78 L.Ed.2d 267, 274, 104 S. Ct. 453, 465 (1983)(per curiam) [effect of ex parte communication on the impartiality of a juror]; Patton v. Yount, 467 U.S. 1025, 81 L.Ed.2d 847, 104 S. Ct. 2885 (1984) [impartiality of an individual juror]; Marshall v. Longberger, 469 U.S. 422, 432, 74 L.Ed.2d 646, 657, 103 S. Ct. 843, 850 (1985) [determination of voluntariness of guilty plea]; Wainwright v. Witt, 469 U.S. 412, 429, 83 L.Ed.2d 841, 105 S. Ct. 844 (1985) [trial court's determination that juror was properly excluded for cause entitled to the presumption of correctness].

In Miller v. Fenton, 474 U.S. 104, 88 L.Ed.2d 405, 106 S. Ct. 445 (1985), although this Court acknowledged that it has not chartered an entirely clear course in the area dealing with the presumption of correctness, the Court nonetheless unequivocally rejected a claim identical to Petitioner's present claim, that those contrary case-specific holdings tactically overturned the long standing rule that conclusions which involve mixed questions of law and fact are not entitled to the presumption of correctness, and are matters for independent federal determination. Id.

Petitioner cites Anderson v. Bessemer City, 470 U.S. 564, 84 L.Ed.2d 518, 105 S. Ct. 1504 (1985) in support of his alternative

argument that even if the statutory presumption of correctness does not apply to this case, the Sixth Circuit Court of Appeals was still required to accord a high degree of deference to the witness credibility determinations of the Federal District Court under the clearly erroneous standard of review. However, the deference teachings of Anderson are as inapplicable to this case as the clearly erroneous standard of review.

The subsidiary findings made by the District Court concerning basic historical facts are subject to review under the deference requirement of the clearly erroneous standard of review. Strickland v. Washington, supra, 466 U.S. at 698. However, the Sixth Circuit Court of Appeals was not bound by the District Court's interpretation of the evidence, including those pertaining to witness credibility determinations, or conclusions of law, when analyzing the performance and prejudice components underlying the District Court's ultimate conclusion that counsel had rendered effective assistance or that Respondent had not been prejudiced by a deficient performance. But, rather, these are matters subject to full appellate review. Id., 466 U.S. at 698. See 9 Wright & Miller, Federal Practice and Procedure, Civil §§ 2588, 2589; Wright, Law of Federal Courts, 2d Ed., §96.

Petitioner attempts to raise the constitutional stature of this case, or give the issue an illusion of "a federal question of substance", by inviting this Court to utilize this case as a vehicle to "delineate more fully the principles regarding questions of 'fact' and questions of 'law' as they relate to the presumption of correctness and clearly erroneous standard for federal review." See Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals, page 40. In reality, Petitioner characterizes, and invites this Court to make the witness credibility determinations of the State and Federal District Court as "classical[ly] questions of [basic, primary or historical] fact", subject to the deference requirements of either 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)], or Rule 52 (a) of the Federal Rules of Civil Procedure.

Petitioner points out, as acknowledged by this Court in Miller v. Fenton, 474 U.S. 104, 113-114, 88 L.Ed.2d 405, 413-414,

106 S. Ct. 445, 452 (1985), the long standing difficulty in distinguishing an issue as one of "law", "fact", or "mixed question of law and fact". However, in contrast to more difficult cases or situations, it is not difficult in this case to make the distinction whether the issue of the witnesses' credibility is a question of historical fact subject to the deference requirements, or a mixed question of law and fact subject to independent federal determination and full appellate review.

In Baumgartner v. United States, 322 U.S. 665, 88 L.Ed. 1525, 64 S. Ct. 1240 (1944), the issue was whether or not the findings of two lower courts satisfied the clear-and-convincing standard of proof necessary to sustain a denaturalization decree. This Court held that the conclusion of the two lower courts that the exacting standard of proof had been satisfied was not an unreviewable finding of fact but one that a reviewing court could independently assess. The Court referred to the finding as one of "ultimate" fact, which in that case involved an appraisal of the strength of the entire body of evidence. The Court said that the significance of the clear-and-convincing proof standard "would be lost" if the ascertainment by the lower courts whether the exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all of the other "facts not open to review here". Id., 322 U.S. at 671. The Baumgartner discussion of "ultimate facts" referred not to the pure findings of fact, but to findings that "clearly impl[y] the application of standards of law".

The Baumgartner definitions may be of little assistance in more difficult cases involving extremely complicated situations; however, these definitions offer sufficient guidance to resolve the issue in this case.

Beyond a doubt, assuming arguendo that the performance and prejudice components of mixed law and fact turned on witness credibility determinations, then they are "facts" which "clearly impl[y] the application of standards of law" in ultimately deciding whether the performance of trial counsel had been

deficient, or that Respondent had been prejudiced by trial counsel's deficient performance. These "facts" which go to the very heart of Respondent's claim of ineffective assistance of counsel, cannot logically or possibly be denominated as subsidiary, basic, primary, or historical facts protected by the statutory presumption of correctness, or insulated from review by the deference requirement of the clearly erroneous standard of review. As this Court pointed out in Anderson v. Bessemer City, supra, 470 U.S. at 575, 84 L.Ed.2d at 529:

> "This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so "internally inconsistent or implausible on its face that a reasonable fact finder would not cre it it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." (Citation omitted.)

The Opinion and disposition of this case by the Sixth Circuit Court of Appeals did not, as Petitioner suggests, turn on a redetermination of the credibility of Respondent's testimony, or that of the other witnesses. Smith v. Butler, 366 U.S. 161, 6 L.Ed.2d 184, 81 S. Ct. 937, rehearing denied, 366 U.S. 941, 6 L.Ed.2d 852, 81 S. Ct. 1657 (1961). The findings of fact set forth in the majority opinion of the Court of Appeals, including those pertaining to witness credibility, are drawn from the record and do not conflict with, or contradict, any findings of basic, primary, or historical facts found by either the State trial court or the Federal District Court. The opinion of the Sixth Circuit Court of Appeals differs from that of the lower courts only in the application of the facts adduced at both evidentiary hearings to the performance and prejudice components of the ineffective assistance of counsel analysis, which was either overlooked or ignored by the two lower courts.

It was not, as Petitioner claims, a reassessment of Respondent's testimony for the Sixth Circuit Court of Appeals to

make the accurate factual observation that his testimony was uncontradicted at either evidentiary hearing. Such an observation also does not run afoul of this Court's admonition in Marshall v. Lonberger, 459 U.S. 422, 434, 74 L.Ed.2d 646, 658, 103 S. Ct. 843, 851 (1983), as the deference requirement of 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)] does not apply to the performance and prejudice analysis. Strickland v. Washington, supra, 466 U.S. at 698. In addition, the Court of Appeals simply made an observation that is part of the description of this case; and, unlike the lower court in Marshall v. Lonberger, supra, did not rely solely on Respondent's uncontradicted testimony in reaching its ultimate decision.

It was not, as Petitioner asserts, conjecture or a reassessment of Respondent's testimony for the Court of Appeals to say that Respondent "...unquestionably mentioned them (his defense and alibi witnesses) to both Price and Solomon..." Mr. William Price, the originally court-appointed trial counsel, submitted an affidavit in the Federal District Court in which he averred that he withdrew as Respondent's trial attorney "...inasmuch as my trial calendar would not permit me to interview the several witnesses that the (Respondent) had in the State of Ohio and initiate other investigations necessary to provide the (Respondent) with an opportunity for a fair trial." See Affidavit of William L. Price, September 19, 1985. Mr. Barry Solomon, Respondent's court-appointed appellate counsel, testified at the evidentiary hearing in Federal District Court that he remembered Respondent telling him something about Mr. Stern (trial counsel) not calling his alibi witnesses in defense at his trial.[1] (EH-2, page 16)

---

1. The Court of Appeals was not in error, as Petitioner mistakenly believes, in its stat ment that Respondent "...unquestionably mentioned them (the witnesses to both Price and Solomon..." Respondent unquestionably told his original court-appointed trial counsel (Price) and his court-appointed appellate counsel (Solomon) about the existence of his defense and alibi witnesses. See Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals, page 36, fn.1.

He testified that he must have asked his law partner (Mr. Stern) about the matter, and was satisfied with his answer because he did not raise the issue on direct appeal. (EH-2, pages 16-17) Plainly, the asserted "conjecture" or "reassessment" is, in reality, factual evidence in this case drawn directl from the record.

It is true that the Court of Appeals stated that there was no evidence on the record to indicate that trial counsel knew the reason for Mr. Price's withdrawal from the case. Yet, Mr. Stern knew of Respondent's claim of the existence of defense witnesses by reason of his presence when Respondent complained to the trial court that "you hampered my defense by keeping me locked up and I can't find several of my witnesses." (TT, page 5) Respondent's indignant complaints and outbursts could not have possibly escaped Mr. Stern's attention. The Court of Appeals acknowledged that Respondent did object to the trial court's "hampering" of his defense by preventing him from finding his witnesses.

It was not, as Petitioner alle es, a blatant example of appellate reassessment for the Court of Appeals to say that "...no conceivable reason exists for him (Respondent) to have withheld this information (existence of his witnesses) from his counsel ..." Respondent told his original counsel, Mr. Price, about his witnesses; he complained to the trial court about his need and inability to contact his witnesses; Mr. Stern was present during Respondent's claim in open court concerning the existence of his witnesses; and, later, Respondent informed his appellate counsel, Mr. Solomon, that trial counsel had failed to investigate, interview and produce his witnesses at trial. The Court of Appeals was simply pointing out that it was highly unlikely, implausible and internally inconsis ent for the District Court to conclude that out of all of the people involved in this case, Respondent "chose not to tell Stern" of the existence of his defense and alibi witnesses. The more logical conclusion is that if Mr. Stern did not investigate the defense witness, Mr. Jackson-El, when Respondent brought him to Mr. Stern's attention, that he also did not investigate the alibi witnesses when

Respondent brought them to his attention.

It is true that Respondent was a very assertive, vocal, and probably indignant person at trial; and, contrary to Petitioner's allegations, Respondent did immediately raise the issue of his alibi defense to Mr. Price, probably Mr. Stern, and Mr. Solomon on direct appeal. It is also true that the alibi issue was not specifically raised in the courts until the second series of appeals. However, that delay can be attributed to the ineffectiveness of trial counsel to present his alibi defense at trial; and, Mr. Solomon's refusal to raise the ineffectiveness issue on direct appeal against his law partner.

Finally, the Court of Appeals explained the reasons for its findings and conclusions after reviewing the entire record that, although there may be some evidence to support it, the District Court's determination that Respondent had not made a sufficient showing to establish that his claim of ineffective assistance of trial counsel was clearly erroneous. (Appendix, pages 85a-89a)

The usual deference analysis under 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)] is not appropriate in this case as the statutory presumption of correctness is inapplicable to the performance and prejudice components of the ineffective assistance of counsel analysis. Strickland v. Washington, supra, 466 U.S. at 698. However, even in applying those standards, it is noteworthy that the Federal courts are not necessarily bound by a State court's findings and conclusions. A Federal court may give different weight to the facts as found by a State court and may reach a different conclusion in light of the legal standard. Sumner v. Mata II, 455 U.S. 591, 597, 71 L.Ed.2d 480, 102 S. Ct. 1303 (1982).

It is also not necessary in this case to address the applicability of the deference requirement of Rule 52(a) of the Federal Rules of Civil Procedure, as that provision also does not apply to the performance and prejudice components of the ineffective assistance of counsel analysis. Strickland v. Washington, supra, 466 U.S. at 698. However, it is also noteworthy that Rule 52(a)

authorizes and requires appellate courts to review the entire record to determine if a district court's findings of fact or conclusions of law are clearly erroneous. To the extent that findings of fact depend upon credibility determinations, an appellate court is not relieved of its duty to determine if those findings were clearly erroneous. Rule 52(a) requires that an appellate court give due regard to " * * * the opportunity of the trial court to judge the credibility of the witnesses" it does not require that the appellate court unquestionably accept the credibility determinations of the lower court. An appellate court may reverse a district court's credibility determinations, findings of fact, or conclusions of law, even though there is evidence to support them, if the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed, and those determinations, findings or conclusions are clearly erroneous. United States v. United States Gypsum Co., 333 U.S. 364, 394, 395, 92 L. Ed. 746, 68 S. Ct. 525, rehearing denied, 333 U.S. 869, 92 L. Ed. 1147, 68 S. Ct. 788 (1948); Kelley v. Southern Pacific Co., 419 US. 318, 322, 323, 42 L. Ed.2d 498, 505, 95 S. Ct. 472 (1974); Anderson v. Bessemer City, 470 U.S. 564, 84 L. Ed.2d 518, 105 S. Ct. 1054 (1985).

In each case, "the federal habeas petitioner who claims he is detained pursuant to a final judgment of a State court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination * * * on the merits of that claim." Wainwright v. Sykes, 433 U.S. 72, 87, 53 L. Ed.2d 594, 97 S. Ct. 2497 (1977). The decision by a federal district court is subject to full appellate review by a federal court of appeals. Bohardus v. Commissioner, 302 U.S. 34, 39, 82 L. Ed. 32, 58 S. Ct. 61 (1937); Helvering v. Rankin, 295 U.S. 123, 131, 79 L. Ed. 1343, 55 S. Ct. 732 (1935). The deferential review urged by the Petitioner would have the practical effect of abolishing the habeas corpus statute as it applies to State prisoners, by depriving them of any realistic or meaningful habeas review, and placing the federal courts in a position of simply rubber-stamping State court action.

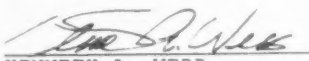
CONCLUSION

The bulk of this Court's cases addressing the issue, almost

without exception, foreclose Petitioner's contention that either the statutory presumption of correctness or the clearly erroneous standard of review applies to credibility determinations which involve a conclusion of questions of mixed law and fact; or, that the ineffective assistance of counsel analysis merits anything less than independent federal determination and full appellate review. Wainwright v. Sykes, 433 U.S. 72, 8 , 53 L. Ed.2d 594, 97 S. Ct. 2497 (1977). Of course, subsidiary basic, primary, or historical findings of fact made by a State court in the course of deciding a claim of ineffective assistance of counsel are entitled to the statutory presumption of correctness. Strickland v. Washington, supra, 466 U.S. at 698. The federal courts should give great weight to the considered conclusions of a co-equal State judiciary. Columbe v. Connecticut, 367 U.S. 568, 605 L. Ed.2d 1037, 81 S. Ct. 1860 (1961)[Opinion of Frankfurter, J.] Similarly, subsidiary basic, primary, or historical findings of fact made by a federal district court in the course of deciding an ineffective assistance of counsel claim are subject to the clearly erroneous standard of review. Strickland v. Washington, supra, 466 U.S. at 698. However, the ultimate question whether, under the totality of the circumstances, counsel rendered effective assistance in a manner compatible with the Sixth and Fourteenth Amendments to the United States Constitution, is still a matter for independent federal determination and full appellate review. Miller v. Fenton, 474 U.S. 104, 88 L. Ed.2d 405, 106 S. Ct. 445 (1985); Strickland v. Washington, supra.

WHEREFORE, for the foregoing reasons, Respondent, Curtis Lee Clark, respectfully prays that this Honorable Court deny the Petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,



KENNETH A. WEBB
Attorney for Respondent
2855 Coolidge Road
Suite 112-A
Troy, Michigan 48084
Telephone: (313) 643-0730

Dated: May 8, 1989

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT REDMAN,

Petitioner,

v.

CURTIS LEE CLARK,

Respondent.

No._____

OCTOBER TERM, 1989

NOTARIZED STATEMENT BY A MEMBER OF THE BAR OF THIS COURT SETTING FORTH THE DETAILS OF THE MAILING, AND STATING THAT TO HIS KNOWLEDGE THE MAILING TOOK PLACE ON MONDAY, MAY 8, 1989 PRIOR TO 11:55 P.M.

State of Michigan)

County of Oakland)

On this 8th day of May, 1989, there personally appeared before me, Kenneth A. Webb, who being first duly sworn, on his oath deposed and said, as follows:

1. That he is a member of the Bar of the Supreme Court of the United States.

2. That on this day, Monday, May 8, 1989, he personally deposited in a mailbox located outside the main post office in Royal Oak, Michigan located at 200 W. 2nd, 48067, Telephone 967-6500 with sufficent first-class postage affixed to envelopes containing copies of Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Motion for Leave to Proceed in Forma Pauperis, this Notarized Statement, Etc. and a copy of his Appearance and Certificate of Service, and which envelopes were plainly addressed to John D. O'Hair, Esq., Prosecuting Attorney of Wayne County, Attention: Timothy A. Baughman, Chief of Research, Training and Appeals and Don W. Atkins, Esq., Principal Attorney, Appeals, 12th Floor, 1441 St. Antoine St., Detroit, Michigan 48226 and to Hon. Frank J. Kelley, Attorney General of the State of Michigan, Law Building, 525 W. Ottawa Street, Lansing, Michigan 48913

3. That the deposit described in paragraph 2. of this statement was made prior to 11:55 p.m.

KENNETH A. WEBB, Attorney for Respondent, 2855 Coolidge Road, Suite 112-A, Troy, MI 48084

Subscribed and sworn to before me, a Notary Public for Oakland County, Michigan

Robert DeWitt My Commission expires:_____

IN THE UNITED STATES SUPREME COURT

ROBERT REDMAN,

Petitioner,

v.

CURTIS LEE CLARK,

Respondent.

No._____

OCTOBER TERM, 1989

/

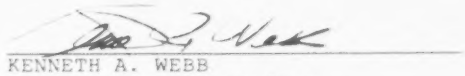
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served have been served with a true and correct copy of Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Motion for Leave to Proceed In Forma Pauperis, Respondent's Notarized Statement By a Member of the Bar of This Court Setting Forth the Details of the Mailing, and Stating that to his Knowledge the Mailing Took Place on Monday, May 8, 1989 Prior to 11:55 P.M., and a copy of this Certificate of Service. and a copy of his Appearance.

I FURTHER CERTIFY that such service was accomplished by deposit, on Monday, May 8, 1989, prior to 11:55 p.m., in a United States mailbox located outside the main post office in Royal Oak, Michigan located at 200 W. 2nd, 48067, Telephone 967-6500 with sufficient first-class postage affixed thereto, addressed to the following persons so required to be served:

1. Hon. John D. O'Hair, Esq., Prosecuting Attorney of Wayne County, Attention: Timothy A. Baughman, Chief of Research, Training and Appeals and Don W. Atkins, Esq., Principal Attorney, Appeals, 12th Floor, 1441 St. Antoine St., Detroit, Michigan 48226.

2. Hon. Frank J. Kelley, Attorney General of the State of Michigan, Law Building, 525 W. Ottawa Street, Lansing, Michigan 48913



KENNETH A. WEBB
Attorney for Respondent
2855 Coolidge Road, Suite 107
Troy, Michigan 48084
Telephone: (313) 643-0730

Dated: May 8, 1989